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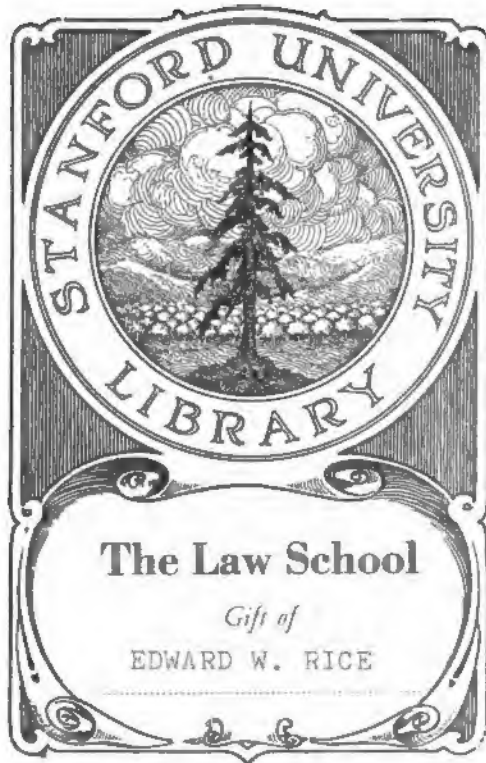
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A TREATISE
ON THE LAW OF
TRUSTS AND TRUST SETTLEMENTS
INCLUDING ITS APPLICATION TO
PRACTICAL CONVEYANCING.

BY
JOHN M^CLAREN, ESQ.,
ADVOCATE,
LEGAL ASSESSOR FOR THE CITY OF EDINBURGH.

IN TWO VOLUMES.

VOL. I.

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TO

GEORGE YOUNG, ESQ.,

HER MAJESTY'S SOLICITOR-GENERAL FOR SCOTLAND.

SIR,

I HAVE much pleasure in being permitted to dedicate this Treatise to you. The learning and great experience which, as an advocate, you have brought to bear upon the elucidation of the modern law relating to Trusts, enable you to appreciate the difficulties attending a systematic exposition of the subject ; while the approval you have kindly expressed of my design, encourages me to hope that it may meet with an indulgent reception from the public.

I have the honour to be,

SIR,

Your obedient Servant,

JOHN M'LAREN.

P R E F A C E.

THE present work is the result of an attempt to investigate the doctrines of that important and interesting department of the law of Scotland now familiarly known as Equity Jurisprudence, a term for which our technical law language furnishes no precise equivalent.

The limits and scope of the treatise are indicated by its three primary divisions. The First of these embraces the Theory of Trusts, considered in its more general aspects; including the constitution of the relation, the purposes which it may be made to subserve, and the rules by which the different species of Trusts are distinguished, and their import determined.

In the Second Part of the treatise, which relates to the Administration of Trusts, the position of the trustee, and his rights and powers as legal proprietor, are defined; and his duties as custodier of the trust estate ascertained. The uses and purposes of the various classes of settlements are then considered in order, with the correlative obligations devolving upon the trustees of such settlements.

The Law of Powers, including the powers both of trustees and beneficiaries, is discussed in the two succeeding chapters ; and the subject is completed by an exposition of the liabilities of trustees in their relations to the creditors of the trust, to beneficiaries, to co-trustees, and to agents and factors.

Part Third relates to the interpretation of those beneficial provisions which it is the purpose of the trust settlement to secure. Here the subject of the rights and remedies pertaining to the beneficiary, as a consequence of the fiduciary relation, naturally claims precedence. This is followed by an exposition of the doctrines of equity Jurisprudence in relation to the various categories of beneficial interests, including the truster's Radical Right, the wife's Separate Estate, Marriage-contract Provisions, and Legacies. The interpretation of trusts by which a plurality of interests in the same succession are made to centre in one person, involves the examination of questions of a higher degree of complexity, requiring for their solution the aid of the legal presumptions relating to Donation and the Duplication of Bequests, the doctrine of Election, and the important theory of the Satisfaction of Legacies and Provisions. The discussion of Contingent Destinations paves the way to the examination of the subtle and perplexing rules of the Law of Vesting, with the various eventualities which enter into the determination of the question, whether an assignable interest has been acquired.

In a supplementary chapter examples are offered of Styles of Trust Settlements, Contracts of Marriage, and analogous deeds ; embracing examples of most of the forms of destinations, trust purposes, and powers that are likely to be required in practice.

A necessary and very laborious part of the preparation for the work, consisted in the examination of the modern English decisions upon Trust Law, and the selection from them of such as were subservient to the purpose of aiding or illustrating the doctrines of our native jurisprudence. Where English cases have been cited, whether in the text or in notes, the Author has endeavoured to state the import of the point actually decided in each case, in accordance with the method exemplified in Professor Bell's Commentaries.

The Author has much pleasure in acknowledging his obligations to Mr BADENACH NICOLSON, Advocate, to whom he is indebted for the able and most instructive commentary on the Law of Charitable Trusts, forming Chapter XX. of the treatise. The preparation of the chapter was undertaken by that gentleman with the kind intention of relieving the Author from a part of the labour which he had imposed upon himself; and, in his treatment of the subject, Mr NICOLSON has not only presented a complete exposition of the law respecting the administration of charities, but has also most successfully aimed at elucidating the principles of interpretation, by which the construction of charitable bequests is distinguished from that of private settlements. This contribution is the more valuable, because it is the result of a much more careful and systematic examination of the authorities than it was possible for the Author to have bestowed upon this department of his subject.

To another professional friend, Mr MACNIE, of the firm of Mitchell, Allardice, & Mitchell, the Author is greatly obliged for the valuable assistance he has rendered in the revision of the proof sheets. In addition to the benefit derived from his careful and accurate criticism

of the text, the Author is more especially indebted to that gentleman for his assistance in preparing the collection of Styles, in the revision of which Mr MACNIE has so identified himself with the Author, that this part of the work may be considered as their joint compilation.

The printing of the first volume commenced in the Spring Vacation; but all the cases of any importance decided in the Summer Session of 1862 have been introduced into the second volume. The references will be found in the Index of Cases.

EDINBURGH, 12th November 1862.

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ERRATA.

- Vol. I. Page 11, line 7, for "alii," read "alio."
 " 14, line 7, for "disponee," read "beneficiary."
 " 92, in *fin.*, insert reference to Crown Estates Act, 25 & 26 Vict. cap. 37.
 " 289, note (a), for "viride," read "viridi."
 Vol. II. Page 297, first marginal note, transpose the words "legacy" and "provision."
 " 344, line 1, delete the italic title.
 " 360, line 8, for "that vesting," read "vesting of fee."

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A TREATISE

ON THE

LAW OF TRUSTS AND TRUST SETTLEMENTS.

PART I.

OF THE NATURE, PURPOSES, AND CONSTITUTION OF TRUSTS.

INTRODUCTION.

IN the very interesting researches in Ancient Law, lately published by Mr Maine, a warning is addressed to those writers on jurisprudence who, in contempt of the lessons of inductive science, invent theories to account for the origin of the laws and customs which they have undertaken to illustrate. If proof were wanting of the necessity for this caution, we could cite at least half a dozen respectable myths, which, although destitute of any historical foundation, have established a position in the prefatory chapters of our law commentaries, to which they lend the grace of fictitious embellishment without detracting from the utility of the treatises.

The origin of our national system of trust conveyancing is at present involved in obscurity. While we do not profess to have investigated the law of Trusts from the historical point of view, we at least hope, in admitting that we have left this portion of the field unexplored, that our avowal may be the means of directing the attention of some writer, professionally qualified for the task, to this

Origin of Trust
Law in Scotland.

interesting subject of inquiry. We cannot accept that theory which makes the origin of trusts in Scotland contemporaneous with a practice which prevailed in comparatively recent periods of civil commotion, of conveying estates to trustees by way of *ex facie* absolute disposition, for the purpose of securing the property against forfeiture. This theory, based apparently upon conjecture, has been adopted by several writers of eminence (a), who were probably too much occupied with more important matters to think of subjecting it to criticism. There is evidence, however, of the existence of trust conveyancing at a very early period in Scotch history ; and there is reason to believe that the interest of the beneficiary was just as fully recognised by the ancient tribunals as that of any other class of persons claiming the protection of the law.

Equitable Jurisdiction of Ecclesiastical Courts.

. During the historical period antecedent to the Reformation, the interpretation of trust deeds would devolve upon the ecclesiastical courts ; not necessarily because the ordinary courts of justice had refused to take cognizance of trusts, but because the interpretation of trusts belonged to the class of subjects respecting which the Church claimed an exclusive jurisdiction,—a jurisdiction which they did not hesitate to enforce by the sanction of spiritual censure. It is easy to see that the Church had a very substantial interest in maintaining the exercise of jurisdiction respecting trust property. A very large proportion of the wealth of the country, both in land and money, had come to be appropriated to pious, or, as they have since been called, superstitious uses, and was held in fee by individual churchmen or ecclesiastical corporations, subject to the purposes expressed in the will of the founder. Property might be, and was doubtless in many cases, conveyed to a corporation *in puram eleemosynam* ; but much more frequently, as we learn from ordinary civil history, the gift was accompanied by conditions, such as—the building of a church or chapel, the support of a benefice, the appropriation of a share of the revenues to the support of the poor, or to educational purposes. If the donatories of ecclesiastical property were not, individually, very scrupulous in the observance of the testator's injunctions, it was at least necessary, on ordinary principles of prudence, that the Church as a body should undertake, through the instrumentality of its courts, the duty of protecting the interests

Why Jurisdiction assumed.

(a) See Bell's Com. 840 (5th Ed. I. 32) ; Fors. Tr., p. 10.

committed to its care ; a duty, the neglect of which would tend to lessen the confidence of the public in its administrative capacity, and in a proportionate degree to check the current of beneficence. The assumption of equity jurisdiction by the ecclesiastical courts may in fact be traced to two distinct and equally potential motives : first, the necessity of ensuring that the property bequeathed to the Church should reach its appointed destination ; and secondly, the necessity for protecting such property against encroachments on the part of the individuals entrusted with its management, or entitled for the time being to the beneficial enjoyment of its revenues.

Accordingly, it was received as a maxim of the ecclesiastical tribunals, that their jurisdiction extended to everything relating to the administration of wills, *quod ad testamentorum et ultimarum voluntatum cognitionem pertinuit* ; and this assumption of jurisdiction was on similar principles extended to trusts, as involving *fidei ac juramenti interpositionem*. It is matter of history that the administration of the canon law by these courts attained in Scotland a degree of authority never conceded to it in the sister country ; and though we are unable to point to the records of actual decision in this class of cases, the principles of exposition are extant in the *Corpus Juris Canonici*. The Canon law was unquestionably the source of the law of Executry which concerns *administration*, although, as regards *interpretation*, the rules of the civil law have been of greater authority.

Jurisdiction as to
Wills.

The administration of moveable succession according to the rules of the Canon law has always been recognised as an important department of trust law. The history of consistorial jurisdiction, and its connection with the canon law, have been traced by the institutional writers, who, however, do not seem to have risen to the general conception of a universal jurisdiction in trusts on the part of those judicatories. The application of the term " executor " to the next of kin succeeding in the event of intestate succession, has tended to obscure the conception of the office of executor-nominate as identical with that of a trustee. It is clear, however, that the confirmation of an executor nominate, and the attendant formalities, were, from their first institution, a proceeding for the purpose of enforcing the fulfilment of the trusts constituted by the testator's will. The rules established in that behalf by the Bishops' Courts,

Executry Jurisdiction transferred
to Commissary
Courts.

which, prior to the Reformation, exercised jurisdiction in relation to wills, were adopted, with few modifications, by the judges of the Commissary Courts of Scotland, which at the time of the Reformation supplanted the ancient ecclesiastical tribunals. The principle that confirmation was necessary to vest the property in the executor as trustee of the will, although productive of occasional inconvenience, afforded a security against fraudulent administration, at a time when law was less powerful than it now is to protect the interests of the beneficiaries.

Executor nominate originally a Beneficiary.

The rights of trustees and beneficiaries of moveable property in Scotland, were from an early period ascertained and defined in conformity with the principles of the Civil law. The executor nominate, when confirmed, acquired a vested title to the property of the deceased, while his powers and rights as administrator were regulated by the terms of the instrument from which he derived his appointment. If the will were silent as to the disposal of the property, the presumption was, that the executor was to take the succession as a beneficial owner (*a*); the maxim, that an executor for purposes not declared is a trustee for the next of kin, not having been imported into our law till a much later period.

Stat. 1617, cap. 14.

The application of the old rule, however, led to great practical injustice; and accordingly it was enacted by the Legislature, in imitation probably of the Falcidian law (*b*), that for the future, executors appointed without reference to any special trust should be entitled only to one-third of the residue of the estate. By this statute (*c*), which proceeds on the narrative, 'that a great number of ignorant people, the time of their sickness and disease, or otherwise at the making of their testaments and latter wills, do nominate certain strangers to be their executors, meaning only to commit the care of their goods, and diligent in getting thereof, to the saids strangers, and that to the behoof of their children, or other persons who are nearest of kin,' it is enacted that in future all executors, etc., 'shall be obliged to make count, reckoning, and payment of the whole goods and gear appertaining to the defunct, and intronned with by them, to the wife, children, and nearest of kin, according to the division observed by the laws of this realm; reserving only to the

(*a*) See Inst. 2, 23, de Fideicom.

(*c*) Stat. 1617, cap. 14.

(*b*) Inst. 2, 23, 5.

said executors the third of the defunct's part, all debts being first paid and deduced, legacies being imputed towards payment of such third. The further history of the law of executry, with the important changes introduced by the Act 18 Victoria, cap. 23 (a), and the Confirmation and Probate Act, 1858 (b), will be considered in connection with the subject of the duties of trustees of personal estate.

The form of settlement at present in use, by which the beneficiary has no special property in the estate, but merely a right of action, must have been known for a considerable period anterior to the time of our institutional writers, since it appears from their commentaries, that the law relating to its interpretation had already attained to some degree of consistency. In the charters of our older educational and charitable institutions we have examples of trust conveyances embracing all the essentials of the modern trust deed, and framed evidently with a clear appreciation of the legal rights which such instruments were adapted to confer (c). It is evident, however, from the view which Craig has taken of the nature of a trust as a burden upon the feu (d), that the trust destination was in his time regarded rather as an incidental charge upon a lucrative or beneficial conveyance, than as forming the subject of a distinct species of legal interest.

Form of Trust
Deed.

The earlier records of legal decision do not discover much jealousy in regard to the constitution of trusts. In conformity with the principles of the civil law, these rights were regarded as of the nature of mandates; and, as such, they were susceptible of proof in the same manner as other consensual contracts. To explain this,—under the rules of the earlier Roman law, the performance of trusts formed an exception to the ordinary law of mandate, being dependent upon the good faith of the trustee; and although trusts were afterwards, by direction of the Emperor Augustus, made subject to the jurisdiction of the Prætor, the proof of constitution continued until the time of Justinian to be subject to the same formalities as attended the execution of wills. At the suggestion of Tribonian, it

Proof of Trust.
Civil Law Rule.

(a) 18 Vict. cap. 23, § 8.

(b) 21 & 22 Vict. cap. 56.

(c) See, for example, the deeds of constitution of Trinity Hospital (dates 1461 and 1566) and Heriot's Hospital

(date 1623), quoted in the cases of *Forrester v. Mags. of Edinburgh*, 22 D. 1222; and *Trades of Edinburgh v. Goss. of Heriot's Hosp.*, 14 S. 873.

(d) Craig, 2, 5, 9.

was afterwards enacted, that if a testator had trusted to the faith of his heir for the surrender of an inheritance, and this trust could not be made manifest by the depositions of five witnesses in the usual legal manner, the beneficiary might put the fidei-commissary upon oath, and thus force him either to deny the trust or to comply with it.

Proof in Scotland
anterior to 1696,
cap. 25.

Guided by these rules, the courts in Scotland were originally in the practice of allowing trusts to be proved by parole evidence (a); insomuch that even in the case of trusts of landed estate it was held competent to prove the constitution of the trust by writ or oath of the trustee,—witnesses being examined in supplement of the trustee's evidence, where the circumstances were suspicious (b). But a trust of lands could not be executed on death-bed to the prejudice of the heir (c).

Examination of the
Trustee.

From the cases referred to by Lord Stair, it appears that recusant trustees were subjected to a very stringent ordeal of examination, for the purpose of obtaining a disclosure of the conditions of the trust (d). It deserves consideration, whether it might not be advisable, now that so many of the rules of evidence have been relaxed, to return to the old law of evidence regarding proof of trusts. It is probable that the statute of 1696 (e), limiting the proof of declarator of trust to writ or oath, has been sometimes too strictly construed, e.g., in the case of resulting trusts arising upon dispositions taken in favour of purchasers' agents.

Singular Succes-
sors not affected
by latent Trust.

The admission of parole evidence in proof of the constitution of trusts, led inevitably to the adoption of the rule, that singular successors, acquiring *bona fide* and without notice, were secure as to their title; the remedy, in case of a breach of trust, being by a personal action against the trustee (f). On the other hand, a trustee acting in *bona fide* was held not to be responsible to the beneficiary for the results of omission or error, but only for his personal intromissions with the property (g). In an early case, reported by Stair, it was decided

(a) *Stevenson's Exers.*, 12 Jan. 1666, and *Watson*, 22 Jan. 1679, cited in Stair, 1, 12, 17; *Stanipath v. Stanipath*, 1624, M. 16877; *Hamilton v. Hamilton*, 1669, M. 16169; *Forbes v. L. of Boyne*, 1679, M. 16178; *Scot v. Grieve*, 1694, 4 Br. Sup. 177.

(b) See cases cited in Stair, *ubi supra*.

(c) Stair, *supra*.

(d) See *Balmerino v. Powrie*, 1681; *Forbes v. Boyn*, 1679, cited in Stair, 1, 12, 17.

(e) Stat. 1696, cap. 25.

(f) Stair, 1, 13, 7.

(g) Stair, 1, 12, 17. *Cass*, 18 Dec. 1666; *Watson*, 18 July 1672, there cited.

that a trustee, having compounded with the truster's creditors, was not entitled to charge the truster with more than he had actually paid (a).

These decisions, with others cited in the passages of Stair's Institutes above referred to, contain the germs of the leading doctrines in the law of trusts, as now administered in the United Kingdom. The nature of the office of trustee, and of the duties devolving upon him, are clearly, though briefly, defined by our great institutional author. As a depository, the trustee was understood to be fully vested in the possession of the trust property, subject to the obligation of denuding, when he was required to do so by his constituent. As a depository, he was prevented from taking any personal benefit from the subject under his care; and he was understood to be equally precluded from getting any benefit or favour for individual creditors or beneficiaries, to the injury of other parties interested in the estate. In his character of mandatory, the trustee was, by his acceptance of the office, placed under an absolute obligation to fulfil the purposes and directions of the trust; those directions being maintainable against him in an action at the instance of the beneficiary, supported by evidence in writing, or, failing that, by the oath of the trustee himself, coupled with other relevant facts and circumstances. As holder of a gratuitous office, the trustee was entitled to exoneration, provided he acted honestly, and to the best of his judgment, *secundum arbitrium boni viri*.

Trustee, in what sense a Depository or Mandatory.

The most noticeable omission in Stair's summary of the law, is the absence of any distinct statement regarding the administrative functions and powers of trustees at common law. As regards moveable property, doubtless it would be understood that the powers of the trustee were commensurate with those of an executor, who is elsewhere described by Stair as *hæres fideicommissarius* of the moveable succession (b). The powers and duties of trustees of heritable property were at that time very imperfectly understood; and although we have accumulated a considerable mass of decisions on the subject in the century and a half that has since intervened, our law is still very far from being on a level with that of England in regard to the details of practical administration.

Defects of Stair's view.

(a) *Maxwell*, 15 Nov. 1667, cited in Stair, *ubi supra*.

(b) Stair, 3, 4, 24.

Effect of Entail
Legislation on de-
velopment of Trust
Law.

The enactment of the statute concerning Tailzies (a) prevented the development of a system of trust law, adapted to perpetuate the succession of families to heritable property. The constitution of entails by the method of direct disposition to the institute, with a destination over and restraining clauses, was from the first of doubtful efficacy; and, but for the interposition of the Legislature, this method would, in all probability, have been replaced by a form of trust settlement similar to that which has come into general use in England, in spite of the statutes of Uses and de Donis, as the most appropriate mode of effecting permanent settlements of landed estate. But when the machinery of irritant and resolute clauses had been legalized by the Scottish Parliaments, it was unnecessary to call in the aid of trustees for the protection of contingent interests. The capabilities of the trust disposition for the purpose of creating a tailzied succession were not overlooked by the framer of the recent Entail Amendment Act (b), who, apprehensive that trust settlements might be created with perpetual succession, and not defeasible by the heir in possession, took care to insert a clause in the act of Parliament, giving to beneficiaries the same capacity for acquiring the property in fee-simple that had previously been conferred upon heirs of entail (c). By the Entail Amendment Act, trusts of heritable property are placed on a level with entails as regards duration; but as they are not entitled to the privileges of entails in other respects, it is not likely that they will be resorted to in Scotland for the purpose of preserving contingent interests, unless where, from the existence of entailers' debts, or other causes, a strict entail cannot be effected.

Trustee cannot be
lucratus.

It would be useless to attempt to trace in detail the further progress of the Law of Trusts amongst us. Erskine added nothing to its principles. About his time, however, the law received an important illustration from the decision of the House of Lords in the case of the *York Buildings Co. v. Mackenzie* (d), which established the doctrine, that a trustee for sale could not in any circumstances be *auctor in rem suam*. It is remarkable, however, that

(a) Stat. 1685, c. 22.

(b) 11 & 12 Vict. cap. 36.

(c) § 47.

(d) *York Buildings Co. v. Mackenzie*,
13 May 1795, 3 Paton. 378.

nearly half a century should have intervened between the establishment of what we may call the "purity principle," in regard to the conduct of trustees for purposes of sale, and its application to the analogous case of trustees and factors claiming professional remuneration from the trust (a).

The tendency of the current of judicial decision in the present century has been to increase the responsibility of the trustee, while lessening his powers and the importance of the office. His acceptance is no longer material. His place may be supplied by a judicial factor, or the necessity for his existence may be removed by a declaratory adjudication. So little is the appointment of a trustee regarded among the essentials of a deed of settlement, that it has now been settled, by a series of decisions, that the deletion of the names of all the trustees does not nullify the deed (b). Where, as in the *Morgan* case (c), there has been an absolute omission to provide machinery for carrying the trust into effect, the Court will, as trustees of the property, organize a scheme for its management, and appoint managers to carry their resolutions into effect. As regards the liability of trustees, a subject which has of late years received a considerable share of public attention, the evil most to be dreaded is the uncertainty rather than the rigour of the law. The statutory limitation of liability, recently introduced (d), is chiefly valuable as giving fixity to the doctrines on this subject. An examination of the provisions of the English Trustee Acts will show that there is still abundant room for remedial legislation in connection with our own practice.

Tendency of recent Legislation.

We have not thought it necessary to advert, in these introductory observations, to the growth of that elaborate system of trust law which occupies so conspicuous a place in the English equity jurisprudence. The truth is, that the English and Scotch systems, in their technical, and therefore in their historical features, are widely dissimilar, and we are convinced that any attempt to mingle the two would only be productive of embarrassment. Professor Bell, in his

English Trust Law.

(a) As to factors, by *Home v. Pringle*, 22 June 1841, 2 Rob. 384. As to agents, by *Pet. Lord Gray*, 21 June 1856, 19 D. 1.

1861, 23 D. 1213, and cases there cited.

(b) See *Royal Infirmary of Edinburgh v. The Lord Advocate*, 28 June

(c) *Magistrates of Dundee v. Morris*, 1 May 1858, 3 M'Q. 134.

(d) 24 & 25 Vict. cap. 84.

admirable *résumé* of the law on this subject (a), has scarcely referred to a single English decision; and the omission cannot justly be ascribed to any want of partiality for English case lore. Throughout the present volume, we shall abstain from loading our pages with citations from the English reports. Nothing could be easier than to transfer such references, wholesale, from the standard treatises; but nothing could be more useless to the practitioner. When we have occasion to refer to English decisions in illustration of principles, we shall endeavour to state their import in such a manner as to obviate the necessity for consulting reports not generally in the hands of the profession in Scotland.

(a) Bell's Com. 840 *et seq.* (5th Ed. I. 30).

CHAPTER I.

DEFINITION OF THE SUBJECT.

THE earliest account we have of the nature of a trust by a Scotch writer on jurisprudence, is that given by Craig in his chapter *de conditionibus investituris* (a). Regarding a trust as essentially a burden upon a feudal property, he says: "Sunt et quædam conditiones, quæ neque dantis neque accipientis causâ fiunt, et multò minùs utriusque; veluti, si ita convenerit, ut ego tibi feudum concedam, eâ lege ut tu aliî concedas, quod feudum recte fideicommissum dicitur." It is remarkable that this conception of a trust, which approaches very near to the English definition (b) given by Lord Coke, and adopted by modern writers (c) on English law, has not received any attention from our own institutional authors, who agree in referring trusts to one or other of the civil law contracts of mandate and deposit, or to a combination of the two.

Craig's definition of a Trust.

In the civil law itself, trusts were not so regarded. *Fideicommissa* are treated in the Institutes as a distinct species of right, and have a place assigned to them, not in the category of contracts, but in connection with inheritances, to which class of interests they appear, indeed, most naturally to belong (d).

Civil Law Doctrine.

It is nevertheless true that the rights and liabilities of trustees are closely analogous in principle to those which arise out of the contract of mandate; while the obligation to restore the estate unimpaired, which is the function of a depositary, is in like manner binding upon the trustee. Such resemblances may be explained by a consideration of the properties of trust, which possesses, in common with the civil law contract of mandate, the character of a gratuitous office, to be exercised for the benefit of the truster's appointee. As the duties of a trustee differ in many respects from

How far allied to Mandate and Deposit.

(a) Craig de Feudis, 2, 5, 9.

(c) Lewin, Tr., 4th Ed. 13.

(b) Co. Lit. 272 b.

(d) Inst. 2, 23 and 24.

those of a mandatory, we prefer to consider the threefold relation subsisting between the truster, the trustee, and the beneficiary, as a distinct contract, or *quasi* contract, analogous to mandate, from the consideration of which its doctrines may derive aid and illustration.

Definitions of
Stair, Erskine,
Bell, and Pothier.

Before proceeding to define the nature of a trust, we may refer more particularly to the definitions, or attempted definitions, by writers of authority in our law. "Trust," says Stair, "is also amongst mandates or commissions, though it may be referred to deposition, seeing the right is in custody of the person entrusted" (a). And in another place, "Trust is also a kind of deposition whereby the thing entrusted is in the custody of the person entrusted to the behoof of the entruster; and the property of the thing entrusted, be it in land or moveables, is in the person of the entrusted, else it is not proper trust" (b). Erskine's definition is briefer and more clear. "A trust," he says, "is also of the nature of deposition, by which a proprietor transfers to another the property of the subject entrusted, not that it should remain with him, but that it may be applied to certain uses for the behoof of a third party" (c). Professor Bell's definition, also, has mainly in view the relation subsisting between truster and trustee. He says, "In a deed of trust there is a combination of two contracts—deposit and mandate; the estate not being in the trustee for any use or purpose of his own, and the management being regulated by the directions given by the maker of the trust" (d). In the following definition, which we extract from Pothier's "*Traité des Substitutions*," the interest of the beneficiary is brought more prominently into view:—"La substitution fideicommissaire est la disposition que je fais d'une chose au profit de quelqu'un, par le canal d'une personne interposée, que j'ai chargée de la lui remettre."

Proposed Definition.

If we were asked to define trust irrespectively of theoretical views, we should say, A trust is *an interest* created by the conveyance of property to a trustee, in order that he may carry out the truster's injunctions respecting its management and disposal. This definition includes the two essentials of a trust, viz., the conveyance of property, and the creation of trust purposes; and it can easily be shown

(a) Stair, 1, 12, 17.

(b) Stair, 1, 13, 7.

(c) Ersk. 3, 1, 32.

(d) Bell's Com. 841 (5th Ed. I. 31).

that any other properties mentioned in the preceding definitions, and assumed to be characteristic of trusts, are in reality accidental. For example, it is by no means essential to a trust that it should be designed for the benefit of a third party. The beneficiary may, and in many cases is, no other than the truster himself. Nor is it necessary, as assumed by Pothier (*a*), that there should be an ultimate conveyance to some favoured person. The trust estate may be entirely absorbed in the liquidation of debts, or it may be left to the trustees in perpetuity, in order that they may apply the revenues to charitable or other uses.

It is clear, however, that a trust can only exist for the benefit of some other person than the trustee. A conveyance to a party in trust for himself, is just a conveyance in fee-simple; and the same result will follow, when the legal and beneficial interests happen to merge in the same person (*b*). In England, where the right of the beneficiary is regarded as a special property, the union of the two estates is effected by the aid of the legal doctrine of "merger,"—the minor right being absorbed in the major. In Scotland (where the interest of the beneficiary is of the nature of a right of action arising from obligation), the union of the two interests in one person may be described theoretically as an extinction of the trustee's obligation *confusione*.

Trust may be extinguished *confusione*.

Such extinction, however, can only take place when the entire beneficial interest passes to the trustee; for if there be any interest, present or contingent, remaining in another person, the trust will subsist; and the trustee may defend his interest, in an action directed against himself, in conjunction with the co-beneficiary.

Contingent Interest sufficient to preserve Trust.

It is by the existence of trust purposes in connection with a conveyance of property that we are enabled to distinguish trusts from the other legal rights to which they are nearly allied. Thus, the fact that an estate is *conveyed* to the trustee, serves to distinguish the relation of trust from that of factory and commission; for, though the purposes of the factory may be similar, and the powers of the commissioner as regards disposing, etc., equally extensive, yet the property of the estate is not vested in the person of the factor. On the other hand, a trust is distinguished from a mere deposit by the nature of the duties devolving upon the trustee,

Purposes and a Conveyance are essential.

(a) Poth. Ed. Dupin, VII. 547.

(b) See Inst. 3, 27, de Mandato.

which are not, as in the case of a depositary, limited to the safe keeping and restoration of the subject, but may embrace almost all the powers and responsibilities of ownership.

Simple Trust equivalent to Deposit.

A simple trust, as defined by the English writers, would appear to be the same as a deposit, with this exception, that the estate is held not necessarily for the depositor, but for the benefit of some person nominated by him (*a*). It confers on the disponent the *jus habendi*, or the right to be put into possession of the property, and the *jus disponendi*, or right to call upon the trustee to execute conveyances in favour of another. The notion of a simple trust is arrived at by abstracting all discretionary purposes from an ordinary trust. In like manner, trust may be resolved into mandate by abstracting the element of property.

Trust in Scotland not annexed to the person.

From the union of the functions of mandatory and depositary in the person of the trustee, there arise certain important properties of trusts which cannot be referred to either mandate or deposit separately. Chief in importance amongst these, is the rule, that personal trusts are binding upon strangers. Another distinguishing feature of trusts, is the peculiar tenure of the legal estate, which in Scotland is annexed not to the person, but to the office of the trustee; insomuch that, although during the continuance of the office the trustee's title is complete, leaving only a bare right of action in the beneficiary, yet that property title neither transmits to the heirs of the trustee unless specially called by the destination, nor to his representatives in bankruptcy. So also, in the event of a total failure of the trustees, the trust is said to lapse, and the title remains in suspense until it is adjudged by the party beneficially interested, or is vested in a factor by warrant of the Court of Session.

(a) Lewin, Tr., 4th Ed. 17.

CHAPTER II.

CLASSIFICATION OF TRUSTS.

THE most general division of trusts is into Simple and Special.

A simple trust has been defined as a conveyance of property to one person upon trust for another ; in which case, the nature of the trust, not being qualified by the settlor, is left to the construction of law (a). In this case, the trust is held to be executed as soon as the trustee has made up a title to the property ; and the beneficiary has then the right to call upon the trustee to denude, either in favour of the beneficiary himself, or of any other person he may appoint.

Simple and Special Trusts.

As an example of the *simple* trust, we may mention, trusts of heritable property for behoof of a partnership or joint stock company. A special trust may be resolved into a simple in consequence of the impossibility of executing the special purpose ; as, where trustees are directed to hold land for behoof of A. in liferent, and B. in fee, and A. predeceases the testator. The estate is then a simple trust for B. and his heirs.

Examples of Simple Trust.

A *special* trust is constituted, where the aid of a trustee is sought for the execution of a specified purpose. It is only in the special trust that the trustee can be said to exercise the functions of a mandatory ; and in the execution of such trusts, the duties of the trustee may vary to any extent compatible with the nature of the subject, and the scope of the truster's intention.

Special Trusts.

Special trusts have been subdivided into *ministerial* (or *administrative*) and *discretionary*. The former, being such as any intelligent and skilful person is presumed to be capable of performing, may be executed by the Court through the instrumentality of a factor. Discretionary trusts are those, the administration of which depends to a certain extent upon the pleasure of the trustee, guided by discretion and his knowledge of the circumstances of the bene-

Trusts Ministerial and Discretionary.

ficiaries; as in the case of a trust for apportioning a fund amongst children. Such trusts partake of the nature of powers; and are presumed to have been conferred upon the trustee from the exuberant confidence which the testator had in his discretion. They are, therefore, strictly personal rights. And while the exercise of a discretionary trust is imperative on the trustee, if he accepts the trust; yet, if he declines to accept, or dies without executing it, the trust cannot be carried into effect by the Court (a).

When a Discretionary Trust lapses.

In the case of a trust to divide property amongst the children of a particular family or class, or to distribute a fund at discretion amongst certain objects of bounty mentioned by name, the trust will not lapse upon failure of the trustees. The discretionary element being eliminated, there remains a simple destination for behoof of parties named or described; who are therefore entitled to a joint conveyance, or, what is equivalent to it, a division of the subject amongst them in equal shares (b). But a trust to distribute amongst such charities as the trustee may think fit, is incapable of being administered without the exercise of an arbitrary discretion, and must of necessity fall to the ground by the declinature of the trustees. In this class of discretionary trusts, the failure to administer leaves the property in the condition of intestacy (c).

Lawful and Unlawful Trusts distinguished.

Trusts have also been divided into *lawful* and *unlawful*, though those which are called unlawful ought rather, as we think, to be excluded from the category. Amongst unlawful trusts are included such as contemplate the benefit of the truster himself, to the exclusion of his creditors, or which create unlawful preferences.

Public Trusts.

A more important division of trusts is that of *public* and *private*. *Public trusts* are defined by Lewin (d) to be "such as are constituted for the benefit either of the public at large, or of some considerable portion of it, answering a particular description." From the number and importance of the trusts created in modern times by Parliamentary authority, the decisions relative to trusts of this description are not to be wholly overlooked in a treatise on trust law. It may be ob-

(a) See *Nisbet v. Tod*, 15 Jan. 1848, 10 D. 361.

(b) *Sivright v. Dallas*, 27 Jan. 1824, 2 S. 643; *Watson v. Marjoribanks*, 5 S. 586, 591.

(c) *Merchant Co. v. Mag. of Edinburgh*, 1765, M. 7448; *Dick v. Ferguson*, 1758, M. 16206; *Ireland v. Glass*, 18 May 1833, 11 S. 626.

(d) Lewin, Tr., 4th Ed. 19.

served, however, that the duties of such trustees are, for the most part, either such as are common to all fiduciary persons, or they are of such a strictly local and personal character as to be useless for precedents in other cases. On this account we have not thought it necessary to treat separately of Parliamentary trusts. The duties of trustees for Charitable purposes (another branch of public trusts) will require to be specially considered.

Private trusts are those which are established for the benefit of a limited number of individuals, who either are at the date of the settlement, or may upon the expiry of liferents, be definitively ascertained. As regards heritable property, their duration cannot be extended beyond the limits assigned by the Entail Amendment Act (a), which are substantially equivalent to those specified in the Act passed with reference to the will of Mr Thellusson (b). The law of Scotland has not as yet put any positive limits to the duration of trusts of moveable property; but it is scarcely conceivable that a private trust in perpetuity would be sanctioned by the Court, even if the difficulties arising from the natural reluctance of trustees to undertake such an office could be overcome (c).

The last division to which we shall allude, is that into trusts *constituted by the act of a party*, and trusts *by operation of law*. The first class includes not only written trusts, express and implied, but also such latent trusts as are constituted by verbal agreement, without back-bond or written acknowledgment, and which, according to the Scottish statute (d), can only be proved by the oath of the trustee. The second class comprehends Resulting trusts, where the title to property happens to be separated from the beneficial ownership without any intention of creating a special trust; and Constructive trusts, which is merely another name for the duty of restitution, which may be enforced against a party acquiring property by an illegal title.

(a) 11 & 12 Vict. cap. 36, § 7446; *Barholm case*, 1752, in 5 W. & S. 180, note; *Mason v. Skinner*, 6

(b) 39 & 40 Geo. III. cap. 98.

Mar. 1844, 16 Jur. 422.

(c) See *Dick v. Ferguson*, 1758, M.

(d) Stat. 1696, c. 25.

CHAPTER III.

OF THE CONSTITUTION OF TRUSTS BY BACK-BOND OR ADMISSION UNDER THE STATUTE 1696, CAP. 25.

Trust may be
constituted by
Parole.

A TRUST, like a mandate, may be constituted either verbally or in writing; and in practice many trusts of importance are constituted without writing, and are capable of being enforced as verbal obligations. The mode of constitution is, however, liable to be affected by the operation of two causes. The subject of the trust conveyance may be one requiring the interposition of writing for its transference. Where this is the case, then the provisions of the Act 1696, cap. 25, render it expedient that the trust purposes should be declared in the same form; for, otherwise, the proof of the trust must rest upon the oath of the trustee. Looking to the substantial of the relation, apart from forms of execution, it appears that nothing more is requisite to the constitution of a trust than the acceptance of the property, subject to the purposes of the granter, which may be declared either in writing or by verbal mandate, in which last case the trustee's acknowledgment is evidence of the antecedent agreement.

Trust may be
declared by
Disposition or
Back-bond.

Accordingly, a trust may either be constituted by a trust disposition, wherein the granter himself declares the purposes either specifically, or by reference to some other writing under his own hand; or it may be constituted by *ex facie* absolute disposition, qualified by a back-bond or acknowledgment of trust, executed by the trustee. The form of disposition *ex facie* in trust (called a trust disposition and settlement), is the one employed in the constitution of testamentary trusts and family settlements. The *ex facie* absolute disposition and back-bond are more usually resorted to for the creation of trusts *inter vivos*, connected with the management or disencumbrance of the trust property, or the extrication of the truster's affairs. This form has the advantage of enabling the trustee to

transact with third parties with facility, and to execute conveyances in favour of purchasers without disclosing the conditions and purposes of the trust. For, of course, the purchaser is not bound by, and has no right to inquire into, conditions which do not enter the record; these being merely personally binding on the trustee (a). Therefore, even in a case where an *ex facie* absolute disposition bore to be granted "for the causes and considerations mentioned in a back-bond," the Court refused to permit an inquiry into those causes at the instance of a purchaser, to whom part of the estate had been feued out (b). The disadvantage of this mode of constitution is, that the property of the estate passes to the trustee, and is liable to be carried off by his creditors.

Prior to the passing of the Act 1696, the opinion of the Court seems to have fluctuated a good deal with respect to the legal evidence in questions as to mandates and trusts; and in the case of a mandate to enter into such contracts as might be proved *prout de jure*, the same sort of evidence was allowed in the proof of the mandate itself (c). However, a practice afterwards crept in, of limiting the proof of the constitution of trusts and mandates of greater importance to writ or oath (d). This rule of evidence ultimately received the sanction of the Legislature as regards all actions of declarator of trust; but as to questions of simple mandate, the Courts have reverted to the ancient practice; and accordingly a mandate to purchase heritable property may be proved *prout de jure* (e), provided the title has not been taken in the name of the mandatory with consent of his constituent (f).

Proof of Trust
at Common
Law.

Although in theory the constitution of trusts is not dependent upon writing, yet the Act of 1696, cap. 25, by limiting the proof of such contracts, has, in all but a few exceptional cases, made writing practically essential. This statute proceeds on the narrative, that the entrusting of persons without a declaration or back-bond of

Stat. 1696, cap.
25.

(a) *Somervails v. Redfearn*, 1 June 1813, 1 Dow 50, revg. M. Ap. Pers. and Real, No. 3; *Burns v. Laurie's Trs.*, 7 July 1840, 2 D. 1348.

(b) *Edward v. Sheill*, 12 Feb. 1848, 10 D. 685.

(c) See Bell's Com., 5th Ed. I. 479; Tait's Ev. 299; Dickson, Ev. § 567; Cases in Mor. Dic. 12897 *et seq.*

(d) *Stair*, 1, 12, 17, and cases there cited; and see cases in Br. Syn. 2577-2581.

(e) *Tweedie v. Loch*, 5 Br. Sup. 630; *Alison v. Alisons*; *Maxwell v. Maxwell*, *id.* pag.; *Maclean v. Richardson*, 1 July 1834, 12 S. 869, per Lord Pr. Hope.

(f) *Alison v. Alison*, 1771, M. 12760.

trust in writing, was an occasion of fraud, and of many pleas and contentions. It consists of two clauses. With the first, which relates to blank bonds, we are not at present concerned. By the second clause it is enacted, "That no action of declarator of trust shall be sustained as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust, lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignees, the declarator shall be intended, or unless the same be referred to the oath of the party *simpliciter*."

Division proposed.

The terms of this enactment have been very carefully and somewhat critically construed, and its meaning may now be considered as finally settled by the numerous cases which have arisen in connection with its provisions. In examining the authorities bearing upon its construction, we shall consider in order—(1) to what transactions the statute is applicable; (2) what kind of written evidence it requires; and (3) how far the rule of evidence introduced by the statute is binding upon third parties (*a*).

SECTION I.

WHAT TRANSACTIONS ARE AFFECTED BY THE STATUTE.

Disposition for purposes to be declared.

1. The trusts referred to in the Act are those which are constituted by an *ex facie* absolute disposition. Accordingly, the Act does not apply, in any sense, to settlements of property bearing to be in trust for purposes to be afterwards declared, and still less to settlements containing *in gremio* the conditions of the conveyance (*b*). In the class of trusts for which it has made provision, the settlor places the property *ex figurâ verborum* at the absolute disposal of

(*a*) In England the proof of trusts of real property is regulated by the Statute of Frauds (29 Car. 2, cap. 3, § 7), which enacts, that "all declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of noneffect."

(*b*) As by the terms of the English Statute of Frauds (29 Car. 2, cap. 3, § 7), trusts are not necessarily to be declared in writing, but only to be "manifested and proved," it is held that a subsequent acknowledgment by the trustee is sufficient to rear up the trust (Lewin, Tr., 4th Ed. 44). Some of the English cases as to the kind of evidence admissible under the statute will be afterwards noticed.

his trustee; and, in the usual course of business, the terms of the back-bond have been adjusted by the truster before the transaction is completed by delivery of the conveyance; so that the back-bond is, in reality, as much the deed of the settlor as if its provisions had been inserted in the conveyance. If this has not been done, the presumption is, that the settlor intended to confide solely in the honour of the trustee, whose subsequent declaration of trust must be taken, subject to such qualifications in his own favour as he may attach to it (a). But in the case of a disposition ostensibly in trust, the trustee is not presumed to have any beneficial interest. While the purposes remain undisclosed, he is in the position of a depository, taking the estate as a simple trust for the grantor and his heirs. To allow the written declaration or oath of the trustee to contradict or explain the terms of the trust, would be, in effect, to break down the security which the settlor has interposed for his own protection and that of the beneficiaries, and to violate that familiar rule of law which excludes parole or general evidence in contradiction of the terms of a written document.

In the case of *Forsyth's Trustees v. Maclean* (b), an attempt was made to prove a *legatum liberationis* by the oath of a testamentary trustee, as a defence to an action at his instance for payment of a debt of L.100. But the notion of applying the rule of the statute 1696 to express trusts was unanimously repudiated by the Court. "The proposal here," said the Lord President (c), "seems to me a very curious one. It is a proposal to prove by the oath of one trustee, that he received instructions by the truster to pay over part of the estate in the face of the written deed—to prove by one of a body of trustees, that the truster told him verbally that the estate was not to be applied in terms of the deed, but in some other way. I cannot sustain the competency of such reference" (d). In this case the judges were of opinion that the alleged direction could not receive effect even as a nuncupative legacy, to the extent to which such legacies are admissible, because it related to a specific subject. But it would seem, on the authority of the case of *Kelly v. Kelly* (e),

Incompetent to refer to Oath of Dispositive in trust.

(a) See *Young v. Campbell*, 19 Nov. 1851, 14 D. 63.

(b) *Forsyth's Trs. v. Maclean*, 18 Jan. 1854, 16 D. 343.

(c) Lord Colonsay.

(d) 16 D. 346.

(e) *Kelly v. Kelly*, 8 March 1861, 23 D. 703.

that a bequest of a sum of money, restricted to the extent of L.8, 6s. 8d., may be proved as a nuncupative legacy by the judicial admission of the executors.

Secus where Trustee has the Residuary Interest.

The case of *Phin* (a) is not touched by the decision in *Forsyth's Trs. v. M'Lean*. That decision imports that a reference may be made to the oath of an executor, who is universal or residuary legatee, to support a trust for payment of legacies. The principle of the decision seems to be, that a trust may be engrafted upon the beneficial interest. As the oath of the residuary legatee, if affirmative of the reference, could not militate against any other interest than his own, such a reference is not open to those objections which exclude its application to the case of executors *qua* trustees. In the case of *Murray v. Lawrie's Trs.* (b), the subject of the reference was neither a trust nor a legacy, but the subsistence of a debt due by the truster. The authority of this case, which is at any rate somewhat shaken by the observations in the case of *Forsyth's Trs.*, does not affect the present question.

Can Resulting Interests be defeated by Parole?

It has been asked, in the case where a testator disposes an estate to persons as trustees, but no trusts are declared by the disposition, so that the beneficial interest would, upon the face of the instrument, result to the heir-at-law or next of kin,—whether it would be competent to prove a parole declaration of the purposes of the trust by the evidence of the trustees. Mr Lewin has discussed this question very fully, with reference to the terms of the English statutes regulating the authentication of trusts and wills (c), and expresses an opinion, that where a trust results upon the face of a will, such verbal communings, even when amounting to a promise on the part of the devisee to execute a certain trust, are not a sufficient ground for executing a trust as against the heir-at-law. In Scotland the question has not yet been resolved by any express decision.

Quære, where Disposition *ex facie* absolute.

Supposing the conveyance to be made *ex facie* absolutely, and a declarator of trust to be raised at the instance of the heirs, there can be little doubt that these parties would be bound by the trust purposes specified in the oath or written acknowledgment of the trustee. But where the disposition is *ex facie* in trust, though for

(a) *Phin v. Guthrie*, 1738, M. 3837.
See also *Pet. Montgomerie's Exors.*, 7
Feb. 1811, F. C.

(b) *Murray v. Lawrie's Trs.*, 2 Mar.
1827, 5 S. 515.

(c) *Lewin, Tr.*, 4th Ed. 48.

purposes not declared, it would seem that the death of the settlor, without leaving specific directions, raises a presumption of intestacy, and vests an absolute and indefeasible interest in his legal representatives. The opposite view would be inconsistent with the principle which requires testamentary settlements to be made in writing (a). It is clear that, in the case supposed, a verbal purpose of trust could not be made to affect heritage; and even as regards moveables, it is difficult to distinguish a verbal purpose from the case of a nuncupative will. Supposing such evidence to be admissible, a dishonest trustee might swear that the direction was to hold the property, or a portion of it, in trust for himself, and would thus commit a fraud with impunity.

In the exceptional case of trustees and executors being also the next of kin, the danger referred to does not arise; and the case of *Phin v. Guthrie* (b), already referred to, lends some countenance to the doctrine, that such trustees might be compelled by an oath of reference to disclose the trust purposes which had been verbally communicated to them. Assuming the competency of such a reference, it does not follow that those purposes would be given effect to if they were of a testamentary character. On principle, such declarations ought to be regarded as mere inchoate expressions of an intention, which is not to be regarded as final until reduced to writing.

Same question, where Trustee has the Resulting Interest as next of kin.

2. As the statute of 1696 is applicable *in terminis* only to actions relative "to any deed of trust," its operation will not be extended to those trusts, which have their origin not in the act of the granter, but in the conduct of the grantee. Professor Bell seems to have thought that the effect of the later decisions relative to titles taken in the name of an agent or mandatory, was to do away with the exception in favour of resulting trusts altogether, contrary to his own view of the statute (c). Upon this opinion Mr Dickson (d) justly observes, that the learned Professor's fear is not supported by the authorities (*Alison v. Alison* and *Duggan v. Wight*) which he cites. And we gather from the opinions of the Lord President in *Leckie v. Leckie* (e), and of the Second Division in the case of *Marshall* (f), that the case of *Duggan*,

Whether the Statute applies to Resulting Trusts in Title Deeds.

(a) *Forsyth's Trs. v. M'Lean*, *supra*;
Smiths v. Taylor, 1749, M. 6594.

(b) *Phin v. Guthrie*, 1738, M. 3837.

(c) Bell's Com. 843 (5th Ed. I. 33); Pr. § 1994, 1; Ersk. 3, 3, 34.

(d) Dickson, Ev. § 576.

(e) *Leckie v. Leckie*, 21 Nov. 1854, 17 D. 81.

(f) *Marshall v. Lyell*, 18 Feb. 1859, 21 D. 514.

although a binding authority, is not to be considered as overruling the earlier cases, which support the doctrine, that a party putting himself in the position of a trustee by his own act, may have the trust proved against him by parole evidence.

Spreul v. Crawford.

In the case of *Spreul (a)*, the alleged trustee was in the situation of a *negotiorum gestor* or *pro tutor*, taking upon himself the management of property belonging to a minor without legal authority. While acting in this capacity, he purchased certain adjudications affecting the property, and the point decided was, that the purchase must be held to have been made for the minor's behoof. This decision might have been rested on the principle, that no person occupying a fiduciary situation can enter into any profitable transaction affecting the trust property. But it appears that the Court viewed the transaction in the light of a trust for the minor created by the act of the trustee himself; and on this view of the character of the transaction, they held the trust to be proved by general evidence.

Modern Cases.

The case of *Tweedie v. Loch (b)* was an action against a law agent who had purchased lands at a judicial sale on the employment of the pursuer, and had taken the title in his own name. The Court allowed a proof of the pursuer's averments, but afterwards assoilzied the defender in respect of the evidence. In the cases of *Maxwell v. Maxwell*, and *Stevens's Tr. v. Fraser*, where in somewhat similar circumstances the pursuer succeeded in proving his case, decree of denuding was pronounced (*c*).

On similar principles it has been held, that if a purchaser of scrip from the original allottee neglect to have the transaction entered, and the shares are in consequence registered in the name of the seller, the purchaser may vindicate his resulting interest in the shares, by proving the sale (*d*).

Parole inadmissible, if Owner consent.

In the cases above mentioned the trust was created by the act of the trustee himself, without the authority of the owner of the

(a) *Spreul v. Crawford*, 1741, Elchies, Tr. No. I. See narrative of this case in the opinion of the Lord J.-C. Inglis in *Marshall's case*, 21 D. 521; *Crawford v. Crawford*, 1739, Elch. Tr. No. 8; *Sinclair v. Maxwell*, 1708, M. 16186.

(b) *Tweedie v. Loch*, 5 Br. Sup. 630.

(c) *Maxwell v. Maxwell*, id. pag.; *Stevens's Trs. v. Fraser*, 8 Mar. 1836, 14 S. 676; *Corbet v. Douglas*, *infra*.

(d) *Lauder v. Orr*, 25 May 1853, 15 D. 670.

property. In another class of cases, in which there was evidence of a verbal agreement or consent that the title should be taken in the name of the alleged trustee, the rule of the statute was applied, on the principle, that in such transactions the trust was created by the act of the purchaser himself. The distinction is thus stated by Lord Glenlee in the case of *Mackay v. Ambrose* (a):—"When it is agreed that rights have been taken as the parties intended, but it is averred that this was done in trust, the Act applies. But when it is alleged that the defender was employed to buy for one party, and took titles in the name of another, that is a totally different case, and, no doubt, proof *prout de jure* might be allowed. In an unreported case, *Burns v. Morrison*, that *species facti* actually occurred" (b). The case of *Duggan v. Wight* (c) is the leading authority with reference to purchases taken in name of the agent with consent of his constituent. In this case, the purchaser was a Roman Catholic,—a circumstance which at that time disqualified him from holding heritable property; and it was agreed that the titles should be taken in the name of Mr Wight, his agent. The Court, after considerable conflict of opinion, decided that the proof must be limited to writ or oath; and the interlocutor was affirmed by the House of Lords, on the ground that the case fell within the rule of the statute.

The case of *Marshall v. Lyell* (d) was similar in its circumstances to that of *Duggan*; and it is important to observe, that while the Court refused to grant relief to the purchaser in an action of declarator of trust, an opinion was intimated that redress might be obtained in an action of a different description, founded upon the facts which were in evidence (e). The purchasers in this case were the Presbytery of Paisley. The property acquired was the superiority of a church belonging to that body; and the arrangement was, that the purchase should be made by the agent for the Presbytery;

*Marshall v.
Lyell.*

(a) *Mackay v. Ambrose*, 4 June 1829, 7 S. 699.

(b) 7 S. 702. See also *Skene v. Ramsay*, 5 Br. Sup. 630; *Corbett v. Douglas*, 1808, Hume, 346; *Boswell v. Selkirk*, 1811, Hume, 350; *Mudie v. Ouchterlony*, 1766, M. 12403.

(c) *Duggan v. Wight*, 1797, M. 12761, 3 Paton, 610. See *Gordon's*

Trs. v. Lord Fife's Exr. 5 Feb. 1862.

(d) *Marshall v. Lyell*, 18 Feb. 1859, 21 D. 514.

(e) 21 D. 521, per Lord J.-C. Inglis. We presume his Lordship contemplated an action of reduction. The statutory restriction is *in terminis* applicable only to actions of *Declarator of Trust*.

and that the title was to be completed as soon as the Presbytery were in a position to pay the balance of the price. In the meantime, Mr Marshall, the agent for the Presbytery, borrowed a sum of money to complete the purchase from a friend, in whose name a disposition was taken, subject to an obligation, not by the disponent, but by Mr Marshall for his behoof, "to grant when required the necessary conveyance in favour of the trustees for the Church, or parties to be named by them at their expense." On the death of the disponent, an action of declarator of trust was instituted against his heir, who refused to denude, alleging that he held the property in security of previous advances made by his ancestor to Marshall. The Court found that the right of the Presbytery as beneficiaries could only be established by writ or oath, and in default of such proof, assoilzied the defender. Assuming that Marshall acted as the agent of the Presbytery, and had authority from them to take the title in the name of another party, there can be no doubt that the decision was in accordance with the precedents. If, on the other hand, the case had been that the agent exceeded his powers, the title might have been cut down; but the form of action would in that view have been a reduction, and not a declarator of trust.

Partnership
Cases.

3. An action for the specific recovery of property may be established by other evidence than that of writ or oath, where the relation subsisting between the pursuer and defender, although of a fiduciary nature, is capable of being referred to contract. This is the principle of the decisions in actions between partners, and in some of the cases relating to security titles. For example, if shares in a joint stock company have been entered in the register as the property of another partner, either with the intention of creating a security, or with the view of obviating objections to the admission of the real owner as a partner, the trust has been held to be probative by parole evidence (a). Money deposited in bank (b), or invested in heritage or in security (c), by a partner in his own name, may, if proved to have truly belonged to the partnership, be recovered by the company, even in a question with the

(a) *Stirling v. Stirling and Robert-son*, 5 July 1822, 1 S. 583; *Hume v. Middlemass*, 17 Nov. 1836, 15 S. 30. See 19 & 20 Vict. cap. 47, Part 1.

(b) *Baptist Churches v. Taylor*, 17 June 1841, 3 D. 1030.

(c) *Macfarlane v. Fisher*, 23 May 1837, 15 S. 778; *Dennistoun v. Newbigging*, 2 Dec. 1829, 8 S. 168.

heirs of the partner making the deposit. And where a lease was taken in the joint names of two individuals, it was held competent to prove by parole evidence that the crop and stocking belonged exclusively to one of them (a). The same principle was applied in the case of *Knox v. Martin* (b). Martin, one of the partners of Cochrane and Company, had made payment of a debt due by his copartner Knox, and took an assignation to the decree in his own name, on which he afterwards proceeded to raise diligence. A suspension of the charge was brought, on the ground that although the assignation was taken in Martin's name, the money had been paid out of the funds of the company, and the sum entered to the debit of the suspender in their books. The Court found the reasons of suspension proved by entries in the books of the company, made by their book-keeper under the charger's direction.

But when the ground of action is, that the business itself is a trust for behoof of latent partners, the proof must be of the nature required by the statute (c).

4. Among the decisions relative to security contracts, the first we shall mention are the *Marquis of Queensberry's* case and *Lindsay v. Barmcotte* (d), in which the question related to the property of policies of insurance effected by the claimant's ancestor, and which had been assigned to the company as a collateral security for advances. The judges had no difficulty in holding that a resulting trust might be established in such circumstances, independently of the statute 1696. In *Lindsay's* case, Lord Cuninghame observed, "I agree with Lord Mackenzie in holding that this is not a proper trust, to which the reclamer endeavours to assimilate it, for the

Security
Transactions.

(a) *Kilpatrick v. Kilpatrick*, 27 Nov. 1841, 4 D. 109. See also *Dingwall v. M'Combie*, 6 June 1822, 1 S. 463.

(b) *Knox v. Martin*, 12 Feb. 1850, 12 D. 719.

(c) *Seth v. Hain*, 14 July 1855, 17 D. 1117; *Currer v. Dickson*, 11 July 1857, 19 D. 991.

(d) *Lindsay v. Barmcotte*, 19 Feb. 1851, 13 D. 718; *M. of Queensberry v. Scottish Union Ins. Co.*, 8 Mar. 1842, 1 Bell, 183, affg. 1 D. 1203; *National Bank v. Forbes*, 3 Dec. 1858, 21 D.

79. See as to assignment of leases, *Reid v. Lyon*, 16 June 1832, 6 W. & S. 114, affg. 8 S. 789; *Walker's Exrs. v. Low*, 14 Nov. 1833, 12 S. 44; *Seth v. Hain*, 14 July 1855, 17 D. 1117. As to dispositions of land, *Robertson v. Duff*, 14 Jan. 1840, 2 D. 279; *M'Lelland v. Bank of Scotland*, 27 Feb. 1857, 19 D. 574; *Leckie v. Leckie*, *infra*; *Hawarden v. Dunlop*, 31 May 1861, 23 D. 923. As to delivery orders, etc., *Hamilton v. Western Bank*, 13 Dec. 1856, 19 D. 152; *Hamilton's Exrs. v. Hope*, *infra*; Bell, Pr., § 1367.

purpose of limiting the proof. The present was, from the first, a case of joint obligation rather than of trust. In cases of the former class, it is always competent to prove by facts, or even in part by parole, for whose behoof the transaction has been entered into" (a).

In *Hamilton's Executors v. Hope*, the pursuer's ancestor had assigned all his furniture and moveable effects to a trustee, ostensibly in security of debt, but in reality to protect the property from diligence. In an action of denuding, instituted against the executors-creditors of the trustee, the Court found that the existence of debt was not sufficiently proved, and decerned for payment of the proceeds of the property to the truster's representatives (b).

Deposits in
Security of Ad-
vances.

The law of evidence with reference to securities conceived in the form of an *ex facie* absolute disposition, was very carefully considered by the First Division in the recent cases of *Leckie, Walker*, and *M^cClelland* (c). Such dispositions are frequently used for the purpose of creating an indefinite security for future advances, the intention being to confer upon the disponent all the rights of an absolute proprietor, subject to no other condition than that of an obligation to denude on repayment of advances. Accordingly, it has been laid down, that the debtor has no action to restrict the security to a trust, although he will be ultimately entitled to claim the reversionary interest. His right is simply a personal and contingent right to demand a reconveyance, upon payment of all advances subsequent to the disposition (d).

Disponent's
Right defined.

Remarking upon the nature of the right conferred by a disposition of this nature, which was admitted to have been granted as a consideration for the disponent becoming cautioner in a cash credit bond, the Lord Pres. McNeill observed:—"Granting that it was a security, it is to subsist to this party, with certain rights to him, as proprietor of the subject conveyed by it, greater and more absolute than as a mere creditor he could have possessed. There may be questions of accounting between the parties which have to

(a) 13 D. 725. See *Smollett v. nedy, & Co.*, 11 Dec. 1857, 20 D. Bell, 1793, M. 12354, referred to by 259.

(b) *Hamilton's Ezrs. v. Hope*, 26 Mar. 1853, 15 D. 595.

(c) *Leckie v. Leckie*, 21 Nov. 1854, 17 D. 81; *Walker v. Buchanan, Ken-*

(d) *M^cLelland v. Bank of Scotland*, 27 Feb. 1857, 19 D. 574; *Brough v. Jolly*, 1793, M. 2585; and see cases cited in *Robertson v. Duff*, 14 Jan. 1840, 2 D. 279.

be explicated; but here it is attempted by a declarator to reduce the absolute title to the level of a mere ordinary security" (a). The Court held that the Act 1696 was a bar to such a declaratory conclusion; and as the pursuer had not offered to relieve the disponent of the advances made on his behalf, but merely asked for an accounting with the object of restricting the security, it was thought to be incompetent, *hoc statu*, to go into such an inquiry.

In the case of *Walker v. Buchanan, Kennedy, & Co.*, in which it was alleged that the debt had been extinguished by intromissions with an annuity conveyed by *ex facie* absolute assignation, the Court found that the defenders were bound to hold count and reckoning, on the footing that the assignation was in security. The case was complicated by the allegation that a back letter, granted at the date of the assignation, had been accidentally destroyed: the defender, on the other hand, maintaining that the letter had been given up with the intention of converting the security into an absolute assignation. But the judgment of the majority of the Court, as delivered by Lord Ivory, proceeded rather on the nature of the transaction as admitted by the defender, which, as they held, conferred an equitable right of reversion upon the pursuer (b).

Debtor may pursue an Accounting.

It appears to be doubtful whether an *ex facie* absolute disposition, proved to have been granted in security of future advances, can be made available as a security for sums advanced by the creditor anterior to the date of the disposition, without a special stipulation to that effect (c). If a fund is assigned in security for a specific debt, and the amount of the debt mentioned in the deed constituting the security, the creditor has no general security for advances (d).

Whether an Absolute Disposition secures past Advances.

5. Fraud in the constitution of the trust will also take the case out of the rule of the statute. "It seems almost unnecessary," said Lord J.-Cl. Inglis (e), in the case of *Marshall v. Lyell*, "to add, that while fraud in the constitution of the title will form a good ground, not for a declarator of trust, but for an action of reduction, and may be proved *prout de jure*, fraud which consists merely in

Fraud leading to the Transaction.

(a) *Leckie v. Leckie*, 17 D. 81. See also *Lyon v. Reid*, *supra*, p. 27.

(b) 20 D. 263.

(c) *Robertson v. Duff*, 14 Jan. 1840, 2 D. 279.

(d) *National Bank v. Forbes*, 3 Dec. 1858, 21 D. 79; *Hamilton v. Western Bank*, 13 Dec. 1856, 19 D. 152.

(e) Lord Glencorse. See 21 D. 521.

denying the existence of the trust alleged, will not prevent the operation of the statute; for every trustee who denies the existence of the trust is necessarily guilty of fraud." The case of a mandatory fraudulently appropriating the property of his constituent is an instance in point.

*Chalmers v.
Chalmers.*

In addition to the decisions having reference to the rights of third parties, to be afterwards noticed, we may refer to a recent case (*a*), where a widower alleged that funds in bank in name of his wife's sister had truly belonged to his wife. In this case the Court allowed a proof before answer, and were of opinion that, the averment being of a conspiracy between the wife and her mother and sister to defeat the husband's *jus mariti*, the Act 1696 did not apply. The mere fact, that a deed of conveyance contains a false narrative of a price paid, when it is in reality gratuitous, does not create such a presumption of fraud as will entitle the granter to a proof at large in an action of declarator (*b*).

*Parole Trusts
of Moveables.*

Mr Dickson (*c*) lays down, on the authority of Forsyth, and of a report which occupies a single line in the Dictionary (*d*), that where the right in a moveable estate is not constituted by writing, witnesses are admissible to prove that it is held in trust. This view seems to be in accordance with the terms of the statute, as limited to "deeds of trust." The numerous cases as to gifts *intuitu mortis*, which have lately occurred, and in which it has been the practice to direct an issue to inquire whether the subject was a donation by the deceased, may be referred to this class of cases.

SECTION II.

WHAT EVIDENCE IS REQUIRED BY THE STATUTE?

*The Trustee's
signature is
sufficient.*

The best evidence of trust under the statute, is of course a back-bond, or other probative or holograph writing, signed by the trustee, and expressive of the conditions of the trust. It has never been

(*a*) *Harper v. Hume*, 16 July 1850,
22 Jur. 577.

(*b*) *Chalmers v. Chalmers*, 13 June
1845, 7 D. 865.

(*c*) *Dicks*. Ev. § 575; *Forsyth*, Tr.
54.

(*d*) *L. Strathnaver v. M^r Beath*, 1781,
M. 12757.

considered essential that the writing should be of a formal character. In the case of *Taylor v. Crawford* (a), a letter acknowledging the terms upon which money had been advanced, and signed by the trustee, the words "I agree to the above" being prefixed to the subscription, was held to be a sufficient compliance with the terms of the statute. All the judges were of opinion that the signature of the trustee would be a lawful subscription in terms of the statute although the document were not holograph or tested; and to mark their opinion on this point, a special finding was inserted in the interlocutor (b), that "if the signatures 'William Crawford' to the letter founded on are genuine, and the words 'I agree to the above' are holograph of him, or if the signatures are genuine, the said letter was a sufficient declaration of trust" (c). Upon this decision Mr Dickson (d) remarks, that the subscription would have been good at common law, on the principle that the delivery of the trust property constitutes *rei interventus*; an opinion which has received an indirect confirmation from the decision in the case of the *Church of England Insurance Co. v. Wink* (e).

In another case, where the titles to property were taken in the name of one of the partners of a company, a trust in favour of the copartnership was held to be established by evidence deduced from a variety of expressions in documents under the hand of the partners; and among others, by a description in a contract of copartnership of the parties "as *proprietors* of the field and ground," by bills granted for the price, and by several docquetted statements and accounts which were pronounced to be constructively writs of the defender (f).

Recital in a
Contract is
Evidence.

(a) *Taylor v. Crawford*, 14 Nov. 1833, 12 S. 39.

(b) 12 S. 42. See *Wood, Small & Co. v. Spence*, 14 Nov. 1833, 12 S. 42; *Pet. Montgomerie's Exors.*, 7 Feb. 1811, *supra*; *Mackay v. Ambrose*, 1829, 1 D. & And. 125, per Lord Cringletie.

(c) A signed letter is a sufficient declaration of trust under the English Statute of Frauds. In *Childers v. Childers*, 1 De Gex & J. 462, and 26 L. J. Ch. 643, 743, a father conveyed property to his son for the purpose of giving him a qualification under a

local Act of Parliament. This purpose was expressed in a letter to the registrar; and the Lords Justices thought this was sufficient to show that there was no intention of conferring the beneficial interest, but merely a qualification. See also *Morton v. Tewart*, 2 Y. & C. Ch. Ca. 67; *Bentley v. Mackay*, 15 Beav. 12.

(d) Dicks. Ev. 319.

(e) *Church of England Ins. Co. v. Wink*, 17 July 1857, 19 D. 1079.

(f) *Macfarlane v. Fisher*, 23 May 1837, 15 S. 978.

In the case of *Watson v. Johnston* (a), a recital, in an heritable bond to a third party, of a trust deed having been executed by the granter for payment of his debts, was held by Lord Campbell to afford sufficient evidence of the trust in a question with the granter's creditors to the effect of eliding prescription.

Unsigned Entries in Account Books.

We proceed to the consideration of a question as to which the law must be admitted to be somewhat uncertain and unsatisfactory. We mean the question as to the extent to which unsigned memoranda and entries in account books, together with real evidence, are admissible as equivalents to the statutory back-bond. We have already seen that an acknowledgment of trust is good, although not probative. And it would now seem to be pretty well settled, that even the signature of the trustee may be dispensed with, provided the acknowledgment is distinct and unequivocal. This relaxation of the rule is admitted in the case of a trust proved from entries in business books, the authenticity of which does not depend on subscription (b).

Conflict of Judicial Opinion on the question.

"I am very far from thinking," said Lord Justice-Clerk Hope, in the case of *Seth v. Hain* (c), "that entries in business books, if unequivocal and distinct, may not be most competent evidence of a trust in the property, of the management and application of the proceeds of which such books are the record. In such a case, I do not think that the evidence would be incompetent because the books did not, in set terms and directly, contain a declaration of trust. Neither am I prepared to say that there must be a signature in such books, of the party keeping them" (d). To the same effect is the opinion of Lord Wood, who says, "I am of opinion, in the first place, that the books of the alleged trustee, holograph of himself, amount to writ of party; that they are his writ, although there may be no subscription to the entries or accounts in the books; and that, as being his writ, they form evidence which may be competently tendered in proof of trust, under the Act 1696. And, in the second

(a) *Watson v. Johnston*, 10 April 1848, 6 Bell, 245. A recital is also evidence of trust under the English Statute (*Moorcroft v. Dowding*, 2 P. W. 314; *Deg v. Deg*, 2 P. W. 412).

(b) *Stair*, 4, 42, 6. See *Gordon's Trs. v. Fife's Exr.* 5 Feb. 1862.

(c) *Seth v. Hain*, 14 July 1855, 17 D. 1117; *Stewart v. Bannatyne*, 21 June 1716, M. Sup. Vol. (Bruce); *Reid v. Lyon*, 16 June 1832, 6 W. & S. 114, affg. 8 S. 879; *Currer v. Dickson*, 11 July 1857, 19 D. 991.

(d) 17 D. 1124.

place, that they will be sufficient to prove it, although they contain no positive or direct admission of trust in so many words, if their language is clearly and unequivocally referable to the existence of a trust, and manifestly does not admit of being explained in consistency with the party holding in any other character than that of a trustee" (a). Upon these dicta, Lord Deas remarked,—“Observations were made in that case (*Seth v. Hain*), to the effect that it was not essential that the writ should be subscribed by the trustee. But there was no decision to that effect, either in that case, or in any other that can now be relied on. That entries in books, and even facts and circumstances, may be taken in connection with, and as explanatory of a signed writing, I do not doubt; but that these will do alone, I am not prepared to affirm. If, however, they will do at all, they must be clear and conclusive” (b).

Keeping in view the import of the decisions in the cases of *Walker* and *Seth v. Hain*, just referred to, the correct view would appear to be, that the existence of a trust may be proved by improbable letters or memoranda, authenticated by the signature of the trustee, or by the books of the trustee kept by himself; subscription in the latter case being dispensed with from the necessity of the case; but that real evidence, or “facts and circumstances,” are only admissible to show the terms of the transaction (c).

For example, there can be no doubt, that if the written declaration admits that the estate is held in security of advances, or until payment of the price of the property, parole proof will be allowed as to the extent of the obligation constituted by the declaration. Such is in substance the import of the decisions usually cited on the subject of proof by facts and circumstances (d). And, on the same principle, where property is held for behoof of a religious society or other similar institution, an inquiry may take place into the rules and practice of the association, which, in this case, constitute the conditions of the trust (e). There are not wanting, how-

Entries in the hand of the Trustee may be Evidence.

Extent of the Trustee's Interest, how ascertained.

(a) 17 D. 1125.

(b) *Walker v. Buchanan, Kennedy, & Co.*, 11 Dec. 1857, 20 D. 269.

(c) In *Morton v. Tewart*, 2 Y. & C. Ch. Ca. 67, Lord J. Knight Bruce admitted parole evidence to explain the cause of granting and the weight to

be attached to a letter adduced in support of a trust.

(d) *Wood, Small, & Co. v. Spence*, 14 Nov. 1833, 12 S. 32; *Miller v. Oliphant*, 7 Mar. 1843, 5 D. 836.

(e) See *Davidson v. Aikman*, 1805, M. 14584, 1 Dow, 1, 2 Bligh, 529.

ever, judicial dicta which would give to the evidence of facts and circumstances a somewhat more extended application. For example, in the case of *Chalmers* (a), Lord Fullerton, with whom Lord Jeffrey concurred, remarked :—"It is said the facts and circumstances admitted, are sufficient to prove a trust. Now, I rather think that the cases do bear out this,—that admitted facts and circumstances may supply the want of a positive declaration of trust; but then these facts and circumstances must constitute real evidence of the conduct of the party in relation to the matter, not to be explained in any other way than as an admission that he holds in trust" (b).

Effect of Viti-
ation in essen-
tialibus.

A document purporting to be a declaration of trust will not be received in evidence if it is vitiated in *substantialibus*. Thus, where a party infest on an *ex facie* absolute disposition in 1826 had granted a missive, binding himself to reconvey at any term prior to 1846, and the word forty, occurring in the date of redemption, was written on an erasure, the Lord Ordinary, by his interlocutor, which was adhered to, found, "that the said document does not afford a valid ground of action, and that it is not thereby instructed that the pursuer was entitled to re-acquire the subjects at the date of the present action" (c).

Tenor of miss-
ing Declaration
may be proved.

In the event of a declaration of trust having been lost or fraudulently destroyed, its contents may be proved by secondary evidence; and it does not seem to be necessary to lead a proving of the tenor. In the case of *Kennoway v. Ainslie* (d), which was a reduction of a conveyance by the trustee for breach of trust, it was alleged that the back-bond had been delivered to the trustee for a temporary purpose, and retained by him. A proof having been allowed, their Lordships held "that the allegiance was not of a trust to be proved by witnesses, but of the fraudulent destroying of a back-bond, and

(a) *Chalmers v. Chalmers*, 13 June 1845, 7 D. 870. See also *Lindsay v. Barmcotte*, 19 Feb. 1851, 13 D. 725, per Lord Cuninghame; and *Smollet v. Bell*, 1793, M. 12354.

(b) Under the English statute (*ante*, p. 20), it appears that not only the fact of the trust, but also the terms of it, must be supported by evidence under signature; but it was held by Lord

Alvanley, in *Forster v. Hall*, 3 Ves. 696, that the terms of the trust might be collected from an unsigned paper sufficiently connected with the signed declaration. See Sugd. Vend. and Purch. Ch. 3, § 2.

(c) *Kirkwood v. Patrick*, 25 June 1847, 9 D. 1363.

(d) *Kennoway v. Ainslie*, 1752, M. 12438.

that this is a fact provable by witnesses." And, accordingly, they "found the reasons of reduction relevant and proved." The opinions of the judges in the cases of *Chalmers* (a) and *Walker* (b) may be consulted on this point of practice.

Trust may, of course, be inferred from the judicial admissions of the defender on record, subject to the general rule, that such admissions must be taken with the qualifications annexed to them (c). And an averment of trust made by a trustee for his own interest, will be available to other claimants in the position of contradictors to him (d). We have already seen that admissions to the effect that an absolute disposition was intended to constitute a security for advances, will enable the pursuer to get into an accounting, but will not entitle him to obtain a decree of declarator of trust (e). The same principle would probably be held to govern the construction of admissions made by the trustee on a reference to oath (f).

Judicial acknowledgment of Trust.

In point of principle, it would seem that a declaration emitted upon death-bed will not be binding upon the trustee's heir; and it was so held in a case which occurred prior to the date of the statute, of which a full report has been preserved (g).

The effect of bankruptcy in excluding evidence subsequent in date to the sequestration was very carefully considered in the case of *Mein v. Towers* (h); and it was decided, that a reference to the oath of the bankrupt *in causa* was incompetent, in an action directed against the trustee for the recovery of a specific subject, alleged to be trust property. It will be observed that the present Bankruptcy Act (i) vests in the trustee the whole property of the debtor as at the date of the sequestration, subject, in the case of moveable property, "to such preferable securities as existed at the

Trust cannot be proved by Oath of Bankrupt after Sequestration.

(a) *Chalmers v. Chalmers*, 7 D. 869.

(b) *Walker v. Buchanan*, 20 D. 269, per Lord Deas.

(c) *Adamson v. Adamson*, 29 Jan. 1834, 12 S. 859; *Taylor v. Crawford*, 14 Nov. 1833, 12 S. 41, per Lord Pr. Hope.

(d) *Lindsay v. Giles*, 27 Feb. 1844, 6 D. 771.

(e) *Blaikie*, 17 D. 77; *Walker*, 20 D. 259, cited above.

(f) See *Forbes v. Culloden*, 1712, M. 13236.

(g) *Patten v. Stirling*, 1671, M. 12586, Fors. Tr. 69; and *Crawford v. Bell*, 1687, M. 12591, a case of verbal declaration. And see cases in the following chapter, relating to alterations by the truster executed on death-bed.

(h) *Mein v. Towers*, 11 July 1829, 7 S. 902.

(i) 19 & 20 Vict. c. 79, § 102.

date of the sequestration, and are not now null or reducible ;" while in the case of heritable property, his right is limited "to the extent of the interest in the estate which the bankrupt might legally convey or the creditors attach." This clause clearly excludes the possibility of establishing a latent trust after bankruptcy ; and it has been settled by the case of *Adam v. Maclachlan*, that a reference to the oath of the bankrupt is incompetent even to the extent of constituting a claim in bankruptcy (a). The principle of this decision would equally exclude the bankrupt's written declarations, if subsequent in date to the sequestration ; if prior in date, they would, of course, be admissible in proof of a claim, though they would not confer a preference.

SECTION III.

EVIDENCE IN ACTIONS WITH THIRD PARTIES.

In Questions
with onerous
Assignees.

First, A latent trust is of no avail to the truster in competition with the right of a *bona fide* onerous assignee of the trustee, possessing under an *ex facie* absolute title (b). But a trustee upon the sequestrated estate of the trust disponee (c), or an adjudging creditor (d), is affected by personal trust rights although latent, on the principle that he takes the bankrupt's right *tantum et tale* as it existed in his person. The adjudger or trustee of property in which the bankrupt was infeft, will not, of course, be affected by latent trusts, for he is entitled to take the estate as shown by the records (e).

In Questions
with the Trus-
ter or Trustee.

Secondly, Notwithstanding the doubts expressed by Mr Dickson (f) and by Forsyth (g), on the authority of a dictum of Lord

(a) *Adam v. M'Lachlan*, 29 Jan. 1847, 9 D. 560, overruling *Blair v. Balfour*, 1745, M. 12473. See also Bankton, 4, 32, 5 ; Ersk. 4, 2, 10 ; *Thomson v. Duncan*, 10 July 1855, 17 D. 1081.

(b) *Somervails v. Redfearn*, 1 June 1813, 1 Dow, 50, revg. M. Ap. Pers. and Real, No. 3 ; *Burns v. Lawrie's Trs.*, 7 July 1840, 2 D. 1348. But even the purchaser's sasine is no protection if he is aware of the trust (*Lang*

v. Mag. of Dumbarton, 29 June 1813, F. C.).

(c) *Dingwall's Tr. v. M'Combie*, 6 June 1822, 1 S. 463.

(d) *Preston v. E. of Dundonald's Cr.*, 6 Mar. 1805, F. C., M. Ap. Pers. and Real, No. 2 ; *Gordon v. Cheyne*, 5 Feb. 1824, 2 S. 675.

(e) *Duncan v. Wyllie*, 8 Dec. 1803, Hume, 445.

(f) *Dicks. Ev.* 317.

(g) *Fors. Tr.* 62.

Gillies (a), we must hold it to be settled law, that the Act 1696, cap. 25, does not apply where a latent trust is sought to be proved by a person who was not a party to its constitution, but who has an interest in proving its existence in order to make good his claim against the truster or trustee.

The case of *Elibank v. Hamilton* (b), in which the doctrine here stated was laid down, has been supposed to have rested to some extent upon allegations of fraud; but we do not find that those considerations materially affected the decision of the Court. Lord Alloway is reported as having said, "I do not think that the Act 1696 can at all apply as to the mode of proving the alleged trust. If the question was between Mr Hamilton and his brother [the truster and trustee], it would apply, but not here; and I think the pursuer is entitled to a proof of his averments *prout de jure*." Lord Glenlee said,—“As to the mode of establishing the alleged trust in the person of his brother, I am satisfied that it is only in questions between the truster and trustee that the Act 1696 applies.” Lord Pitmilley concurred; and the Lord J.-Cl. Boyle observed,—“As to the Act 1696, I am quite satisfied that it does not apply here, and does not restrict parties to the mode of proof there specified, as this is not a declarator of trust by the truster against the trustee” (c).

Elibank v. Hamilton.

In the case of *Scott v. Miller* (d), Lord Pres. Hope observed,—“If any third party has an interest to prove the existence of a trust, notwithstanding an *ex facie* ownership, the statute does not apply to him. It does not constrain him to prove trust only by adducing a writ which he had not originally any means of taking at the constitution of the trust, or by means of the oath of a party whom he had never trusted. A third party whose interest it is to unveil the true character of a simulate transaction, and to prove the existence of a trust, notwithstanding an appearance of ownership, has a right to establish this *prout de jure*” (e). This reasoning appears to us to be unanswerable; and although it is true that Lord Gillies dissented from the President’s opinion, in a passage which is quoted with approbation by Mr Forsyth, it does not appear that the rule of the statute ever has been applied to cases of the class under consideration.

Dicta in Scott v. Miller.

(a) *Scott v. Miller*, *infra*.

(c) 6 S. 72.

(b) *Elibank v. Hamilton*, 16 Nov. 1827, 6 S. 69.

(d) 16 Nov. 1832, 11 S. 21.

(e) 11 S. 26.

Point decided
in the Second
Division.

Accordingly, in a recent case, where a party was sued by an assignee in trust upon a bill which the respondent alleged that he had already paid to the cedent, the Court were unanimously of opinion that the fiduciary character of the assignation might be established by a proof at large, for the purpose of fixing the defence of payment on the assignee. The Lord J.-Cl. Inglis observed,—“I am of opinion that the party here is not at all limited by the provisions of the Act 1696, because this is not a question between a truster, or one in his right, and a trustee, or one in his right; but between an alleged trustee and a third party, who was a debtor of the truster, and has been discharged by the truster. The statute does not apply to this case in its terms, nor has it ever been extended to such a case by any decision of this Court”(a). The distinction is well illustrated by the decisions which establish the competency of proving *prout de jure* that titles constituting an electoral qualification were confidential in an objection to a claim of enrolment (b); although, in an action at the instance of the granter, the trust could only be established *scripto vel juramento* (c).

Parole Evi-
dence in Ac-
tions of Relief.

It has been decided in the case of *Murdoch v. Wylie* (d), that parole evidence is admissible to prove a trust in an action by the trustee seeking relief against his constituent. The decision is in accordance with the terms of the statute, which only applies to cases where the trustee is the party “against whom, or his heirs or assignees, the declarator shall be intended.”

(a) *Middleton v. Rutherglen*, 8 Feb. 1861, 23 D. 526; see 528.

(b) *Ferrier v. Morehead*, 1790, M. 8772.

(c) *Douglas v. Dalrymple*, 1770, 2 Paton, 187.

(d) *Murdoch v. Wylie*, 8 Mar. 1832, 10 S. 445.

CHAPTER IV.

OF THE CONSTITUTION OF TRUSTS BY DEED OF SETTLEMENT.

SECTION I.

OF THE EXECUTION OF TRUST DEEDS.

Statutory Solemnities.—Although, as we have already seen, a trust may be proved by the evidence of the trustee, either in writing or on oath, yet, where it is the purpose of the granter to declare the terms of the trust by a writing under his hand, this can only be accomplished by a deed executed in conformity with the statutes regulating the authentication of writs. A conveyance of property in trust must, at any rate, be effected by a regular deed, in which it is usual to specify the purposes of the trust, subject to a power of alteration. Such is the mode of constitution most usually resorted to for purposes of testamentary settlement. Trust Settlements.

But if it be desired, as in trusts for sale, to keep the title of the trustee clear of restrictions which might embarrass him in his dealings with third parties, the form of an *ex facie* absolute deed, with a relative declaration of trust in a separate writing, may be adopted. In testamentary deeds, when the granter has reason to suppose that changes in his intention may arise, a convenient form is that of a trust deed for purposes to be afterwards declared, embracing the usual administrative clauses, with a proviso excluding the rights of the heir-at-law in the event of any future deed or codicil being executed on death-bed (a). A trust, moreover, may be created by taking an investiture in the names of the beneficiaries; in which case, it would Purposes may be in a separate Writing.

(a) *Willock v. Auchterlonie*, 1767, *Vide infra*, p. 63, as to the form of such M. 15945 & 5539, Hailes, 321, 324. proviso.

seem, the death of the purchaser before acceptance of the title has been intimated to him does not invalidate the destination (a).

Statutory So-
lemnities of
Execution.

The authentication of trust deeds, which is subject of course to the ordinary rules of conveyancing, belongs rather to the law of Evidence than to our present subject. It may be sufficient to refer briefly to the statutes which are now in force. The Act 1555, cap. 29, made subscription imperative, subject to certain conditions as to notarial subscription, which were superseded by the more specific regulations of the Act 1579, cap. 80. That Act requires the attestation of two notaries and four witnesses to writs not signed by the granter. By the Act 1584, cap. 4, as extended by custom, sealing is dispensed with. Under the statute 1593, cap. 179, the name and designation of the writer must be inserted in the body of the writ; with reference to which, and to the later statute 1681, it has been held that the addition of "writer hereof" to the name of one of the witnesses was a sufficient compliance with the terms of the statute (b). By the Act 1681, cap. 5 (Lord Stair's Act), it is enacted, "that only subscribing witnesses in writs to be subscribed by any party hereafter shall be probative, and not the witnesses insert not subscribing (c), and that all such writs to be subscribed hereafter wherein the writer and witnesses are not designed shall be null, and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses." The subscription of witnesses is not to be effectual unless they either saw the party subscribe, or give warrant to the notary, or heard him acknowledge his subscription at the time.

Modern Sta-
tutes.

The Act 1696, cap. 15, regulating the subscription and pagination of deeds written book-ways, has been repealed as regards pagination by the Act 19 & 20 Vict. cap. 89. By the Titles to Land Act, 1858 (d), "all deeds, writs, and instruments whatever (e),

(a) *Aberdeen v. Aberdeen*, 1757, M. 6598.

(b) *Dronnan v. Montgomerie*, 1716, M. 16869; *Macpherson v. Macpherson*, 7 Feb. 1855, 17 D. 358.

(c) A trustee does not seem to be disqualified from being an instrumentary witness to the trust deed (*Mitchell v. Miller*, 1742, M. 16900), nor a legatee to a small amount (*Ingram v.*

Steinson, 1801, M. "Writ," 2), nor perhaps even a general legatee (*Graham v. Montrose*, 1685, M. 16887). But it is better not to select a party beneficially interested for a witness.

(d) 21 & 22 Vict. c. 76, § 34.

(e) Pencil writing seems to be admissible (*Williamson v. Kennedy*, 19 D. 443).

mentioned or not mentioned in this Act, having a testing clause, may be partly written and partly printed or engraved:" the provisions in regard to authentication being similar to those of the older statutes. The limits of this treatise preclude us from attempting to give even an outline of this branch of the law of Evidence as settled by decisions. The subject is fully treated in Mr Dickson's work, and in Menzies' "Lectures on Conveyancing" (a).

A few remarks may, however, be made on the subject of the privileges accorded by custom to deeds of a testamentary nature; under which description are included trusts of moveable property executed *intuitu mortis*. On the subject of privilege Erskine has observed, in a passage frequently quoted, that "testamentary deeds are so much favoured, that if the testator's intention appears sufficiently, they are sustained although not quite formal, especially if they be executed where men of skill in business cannot be had" (b). But in practice, the privileges of testamentary deeds do not appear to have been ever extended to any other case than that of notarial execution. By a custom referred to by all the institutional writers (c), and which has now the force of law, a testament of moveables by a party unable to write may be executed by one notary in presence of two witnesses (d). And by the statute 1684, cap. 133, which prohibits clergymen from acting as notaries, there is an exception in regard to "the making of testaments." The effect of this Act, as limited by judicial construction, is, that a will signed for the testator by the clergyman of his parish, before two witnesses, is valid and probative (e). The privilege in question does not, however, affect the statutory requisites as to authentication. Wills executed by clergymen have in various instances been set aside, in respect of the omission of certain of the statutory requisites; e.g., the omission to state that the clergyman's subscription

Privileges of
Testamentary
Deeds. Notarial
Execution.

(a) Dicks. Ev. 348 *et seq.*; Menzies' Lec. on Convey. 8, cap. 2. As to the form and style of trust deeds, see the Juridical Styles, 4th Ed., vol. I., p. 267, and the Titles to Land Acts, 1858 & 1860.

(b) Ersk. 3, 2, 28. See *Norvel v. Ramsay*, 1763, M. 12290; *Kerr v. Hay*, 1708, M. 16968.

(c) Stair, 3, 8, 34; Ersk. 3, 2, 23; Bell, Com. 5th Ed., I. 324.

(d) See *Bog v. Hepburn*, 1623, M. 16960; *Stodart v. Arkley*, 1799, M. 16857; and *contrâ*, *Gallely v. Macfarlane*, 1 Aug. 1843, 6 D. 1.

(e) *Hepburn v. Waughton*, 1606, M. 16827; *Williamson v. Urquhart*, 1688, M. 16838.

was adhibited by the authority of the testator (a); or the subscribing of the name of the testator instead of that of the clergyman (b).

Common Law
requisites of
Authentication.

Holograph Writings.—The most difficult cases with reference to the authentication of wills, are those which relate to the effect to be given to such deeds when executed *holograph*. The authentication of holograph writings being dependent on common law (c), has given rise to a greater latitude of construction than would have been compatible with the sound interpretation of the statutory rules of authentication. As early as the time of the elder institutional writers (d), the privileges of holograph deeds had been extended to such as were holograph in the substantial clauses,—as, for example, in the case of a testament holograph in the sums bequeathed and the names of the legatees (e); while, conversely, holograph writings in which substantial parts had been inserted by another hand were deemed invalid. Accordingly, in very many of the cases relating to holograph wills, questions have arisen regarding the materiality of clauses written in a different hand from the body of the deed.

Bilateral
Deeds, holo-
graph of one
party.

In the ordinary case, a deed by several parties, which is written by one of them and signed by all, will not receive effect as a holograph writing even as against the party who wrote it (f), though it may be validated *rei interventu*—the principle being, that there is no contract unless all parties are bound. But, in the case of *Macmillan v. Macmillan* (g), an entry on the fly-leaf of a family Bible, signed by husband and wife, the entry being in the handwriting of the husband, and bearing that “the longest liver is to have all that remains after our debts are paid,” was sustained as a bequest of the husband’s moveable property. On this case Lord Cuninghame observed: “In an ordinary agreement *inter vivos*, where one party is set free, there is generally a presumption that the other had the will

(a) *Mackenzie v. Burnett*, 1688, M. 16838; *Williamson v. Urquhart*, *supra*.

(b) *Trail v. Trail*, 1805, M. 15955. See *Gray v. Ballegerno*, 1678, M. 16296.

(c) *Stair*, 4, 22, 6; *Ersk.* 3, 2, 22; *Bell's Com.* 5th Ed., I. 324.

(d) See *Stair* and *Ersk.*, *supra*.

(e) *Vans v. Malloch*, 1675, M. 16885, and case of *Hartree* there cited;

Panton v. Gillies, 22 Jan. 1824, 2 S. 632.

(f) *Miller v. Farquharson*, 29 May 1835, 13 S. 839; *Spreul v. Wilson*, 1809, Hume, 920.

(g) *Macmillan v. Macmillan*, 28 Nov. 1850, 13 D. 187; and see *Lawrie v. Lawrie*, 14 Jan. 1859, 21 D. 240; *Wilson's Trs. v. Stirling*, 23 D. 163.

to be set free too. But here there is no such presumption. There is no ground for inferring that the man himself wished his money to go otherwise than as this paper plainly says" (a). It would seem, therefore, that a mutual settlement holograph of one of the parties will be binding on him although not holograph of the other. And it is probable that a holograph docquet in the hand of either party would be sufficient to validate the settlement as against himself (b).

It appears to be settled by authority that a writing purporting to be holograph is receivable as such until the contrary is proved (c), though it is difficult to see why, in the event of a challenge, the burden of proof should not be thrown on the party supporting the deed. In the absence of any statement in a will that it was written by the granter, the party applying for confirmation must undertake the onus of proving its validity. On this subject Erskine has observed (d): "Holograph writings ought regularly to mention that they are written by the granter; in which case, they are presumed holograph unless the contrary be proved. But though this should be neglected, a proof of holograph would be admitted, either *comparatione literarum*, or by witnesses who saw the deed written and signed." In the case of *Anderson v. Gill* (e), the appellants, founding upon a dictum of Lord Jeffrey in the case of *Turnbull v. Doods* (f), attempted to maintain that the onus of proving the will to be the deed of the testator was shifted by merely proving that the signature was in the same handwriting as the body of the deed. But Lord Chelmsford, C., ruled, in accordance with the opinion of the Court of Session, that it was incumbent on the executor to show that the will is in the handwriting of the deceased whose name it bears; in other words, that it is holograph of the testator (g). This rule applies to marginal or other additions to holograph writings,

When Writing
presumed to be
Holograph.

*Anderson v.
Gill.*

(a) 13 D. 190.

(b) *Johnstone v. Coldstream*, 30 June 1843, 5 D. 1297; *Lawrie v. Lawrie*, 14 Jan. 1859, 21 D. 240; *Macintyre v. Macfarlane's Trs.*, 1 Mar. 1821, F. C.

(c) *Ersk.* 3, 2, 22; *Bell, Com.* 5th Ed. I. 324. *Roths v. Leslie*, 1635, M. 12605; *Turnbull v. Doods*, 29 Feb. 1844, 6 D. 896; *Robertson v. Ogilvie's*

Trs., 20 Dec. 1844, 7 D. 236; *Waddell v. Waddell's Trs.*, 13 May 1845, 7 D. 607, per Lord Moncrieff.

(d) *Erskine, supra.*

(e) *Anderson v. Gill*, 16 Apr. 1858, 3 Macqueen, 180; same case, 22 Jur. 478.

(f) *Turnbull v. Doods*, 29 Feb. 1844, 6 D. 903.

(g) 3 Macqueen, p. 186.

and to words written on erasures; and therefore a general statement by the granter, that the will was written by himself, will not relieve the executor from the necessity of showing that such alterations are the genuine act of the testator.

Grantor's Signature essential.

A holograph settlement will not be received as authentic unless the granter has authenticated it by his subscription; for, if not subscribed, such writs are, as Lord Stair observes, "understood to be incomplete acts, from which the party hath resiled;" though he adds, "if they be written in count books, or upon authentic writs, they are probative, and resiling is not presumed" (a). In accordance with this opinion, an unsigned holograph will, though commencing with the name of the party, was unanimously held to be incomplete and inoperative (b). Lord Fullerton justly observed: "The necessity of subscription to a will is a matter which depends on no technical rule, such as the use of dispositive words in conveying heritage, but is familiar to all the lieges without exception. Every man knows the difference between a deed that is signed and one that is unsigned. It appears to me, therefore, that the deceased must have believed and understood that the writing was not effectual so long as he withheld his subscription from it, and that, if we now sustained it as a valid instrument, we should be making a will which the party died believing to be ineffectual" (c). But a notary's holograph docquet, authenticating the deed of a person who cannot write, has been sustained although not subscribed, when it contained the notary's name *in gremio* (d). And an unsigned codicil may be adopted by a holograph docquet (e).

Exceptions.

No absolute presumption that Settlement executed in lecto.

It has been laid down by some authors, perhaps a little too broadly, that holograph settlements, as they do not afford proof of their own dates, are presumed to have been executed on death-bed, and are therefore not effectual for the purpose of conveying heritage. It is no doubt true that, in order to overcome the presumption of death-bed, the date must be supported, as Erskine puts it, by adminicles of evidence (f); but the testator's statement as to the

(a) Stair, 4, 42, 6.

(b) *Dunlop v. Dunlop*, 11 June 1839, 1 D. 913; but see *Gillespie v. Donaldson's Trs.*, 22 Dec. 1831, 10 S. 174.

(c) 1 D. 921.

(d) *Cullen v. Thomsons*, 1731, M.

16842; *Gordon v. Murray*, 1765, M. 16818.

(e) See cases relative to codicils, *infra*, Section II.

(f) *Ersk.* 3, 2, 22; and see *Stair*, 3, 4, 29; *Ersk.* 3, 8, 96.

date is an element which a jury will be entitled to take into view, and which will not require very strong corroboration, unless there is reason to apprehend that the settlor had a motive for antedating the deed (a). Lord Moncreiff was of opinion, that where a reduction of a settlement is brought on the ground of insanity or facility, there is no presumption that the deed was executed whilst the settlor was in a state of incapacity, but that it is the duty of the holder of the deed to bring such evidence as may satisfy a jury that the deed was executed at a time when the granter was capable; and "in the absence of any proof to the contrary, if he does bring before them pregnant circumstances of real evidence, these, when combined with the date expressed in the deed, will be sufficient to warrant a verdict against the ground of reduction" (b).

Presumption
in case of In-
sanity.

Reduction *ex capite lecti* being a personal privilege of the heir, it would seem that a holograph settlement of heritage is effectual, unless that privilege is exercised (c). And it may safely be asserted that the date of a settlement *inter vivos* can neither be questioned by the granter (d), nor by a grantee who has accepted the conveyance (e).

Proof of Date
of Settlements
inter vivos

Authentication of Foreign Deeds.—In conformity with the rule of equity laid down by the civilians, and adopted by all modern states, deeds of conveyance of personal property are valid if executed, in point of style and in point of authentication, in conformity with the *lex loci actus*,—the law of the country in which they are made. As regards real or heritable property, it seems to be essential that deeds of conveyance should be in the form prescribed by the *lex loci rei sitæ* in the requisites of style and of authentication; and the remark is applicable to deeds giving a real right in personalty (f). Such, at any rate, is the law of Scotland; according to which, a foreign testament would be ineffectual to convey lands, even though it were authenticated in the Scotch form, because it would not be a

Settlements of
Personal Pro-
perty.

Real Property.

(a) *Waddell v. Waddell's Trs.*, May 16, 1845, 7 D. 605; and see *Suttie v. Ross*, 3 Feb. 1838, 16 S. 435, per Lord Pr. Hope.

(b) *Waddell v. Waddell's Trs.*, 7 D. 611; and see *Suttie v. Ross*, *supra*.

(c) Tait on Evid. 106; Dicks. on Ev. 403.

(d) *E. Dunfermline v. E. Callander*, 1674, 1 Br. Sup. 703.

(e) *Scott v. Douglas*, 1737, M. 12616, Elch. Prescrip. 12.

(f) Burge, Com. III. 751.

de presenti conveyance (a); while a dispositive conveyance executed abroad would be equally invalid if any of the Scotch statutory solemnities were omitted (b).

Obligation to convey.

But the restrictive operation of the *lex rei sitæ* appears to be confined to deeds of actual conveyance; and, accordingly, it has been held that an obligation to convey Scotch heritable property may be effectually undertaken in a deed framed in accordance with the law of the contract, even when the subject of the conveyance is an inheritance (c). If the case referred to were well decided, it seems impossible to doubt that a mandate or power of attorney, executed in conformity with the law of the granter's residence, should be a sufficient authority to the mandatory to execute a conveyance (d).

Revocation of Settlement of Heritage.

It is now settled that a settlement of heritage may be revoked by a deed executed according to the law of the settlor's residence at the time (e).

Lex Domicilii.
Foreign Wills Act.

The authority of the writers on public law is also favourable to the recognition of wills executed in the form required by the law of the testator's domicile; and, in practice, wills of British subjects executed abroad were always admitted to probate or confirmation, if executed in conformity with British law. The Act 24 & 25 Vict. cap. 114, declares valid any will or other testamentary writing executed in conformity with the forms prescribed, "either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin" (f). This enactment does not apply to settlements of heritage in Scotland, or, as it would seem, to English real estate.

Effect of a Change of Domicile.

In the case of *Purvis' Trs. v. Purvis' Exrs.* (g) it was decided by the whole Court, after a most elaborate argument, that a will exe-

(a) *Melville v. Drummond*, 1634, M. 4483; *Crawfurds v. Crawford*, 1774, M. 4486.

(b) *E. of Dalkeith v. Book*, 1729, M. 4464; *Purvis' Trs. v. Purvis' Exrs.*, 23 Mar. 1861, 23 D. 822, per curiam.

(c) *Cunningham v. Lady Semple*, 1706, M. 4462; *Govan v. Boyd*, 1790, Bell's Oct. Ca. 223.

(d) See *Menzies' Convey.* p. 141.

(e) *Purvis' Trs. v. Purvis' Exrs.*, 23 Mar. 1861, 23 D. 812, 816, where all the English and foreign authorities are cited. *Leith's Trs. v. Leith*, 6 June 1848, 10 D. 1137.

(f) 24 & 25 Vict. cap. 114, § 1.

(g) *Supra.*

cut in accordance with the law of the residence does not lose its force in consequence of the testator's subsequent change of domicile. If it be conceded that the authentication of wills is regulated by the law of the residence (as distinguished from domicile), the conclusion arrived at by the Court in *Purvis*' case is inevitable. It is now settled by statute that change of domicile shall not invalidate the will of any British subject (a). By another Act of the same session (b), some useful regulations are introduced with the view of ascertaining and fixing the domicile of British subjects resident abroad. But, as these regulations are only to take effect conditionally, in the event of the concurrence of foreign powers being afterwards obtained, it is unnecessary for the present to refer to them more particularly.

Blanks in Deeds.—By the Act 1696, cap. 25, it is enacted, Statute of 1696.
 “That for hereafter no bonds, assignations, dispositions, or other deeds be subscribed blank in the person or persons' name in whose favours they are conceived, and that the foresaid person or persons be either insert before or at the subscribing, or at least in presence of the same witnesses who are witnesses to the subscribing before delivery. Certifying that all writs otherwise subscribed and delivered blank, as said is, shall be declared null.” This Act applies to trust deeds blank in the names of the trustees (c). In construing this Act, according to Erskine's view, the names of the disponees will be presumed to have been filled in before delivery, unless the contrary be proved (d); and it has even been questioned whether this presumption would not hold good though the name of the donee were inserted in a different handwriting from that of the body of the deed. The case of *Donaldson v. Donaldson* is an authority to the contrary (e); and Prof. Menzies justly observes (f), that it would be hazardous to risk the validity of a deed on the insertion of a donee's name by a party not designed in the testing clause.

(a) 24 & 25 Vict. cap. 114, § 3.

(b) 24 & 25 Vict. cap. 121.

(c) *Pentland v. Hare*, 22 May 1829, 7 S. 640. But see cases *infra* as to the effect of deletions.

(d) *Ruddiman v. Merchant Maiden Hosp.*, 1746, M. 11462.

(e) Ersk. 8, 2, 6; *Donaldson v. Donaldson*, 1749, M. 9080.

(f) Menzies on Convey. 129.

Blanks, how to
be filled up.

In consequence of inattention to the provision which the Act has made for supplying blanks of this nature, deeds of settlement have, in several instances, been defeated. In *Pentland v. Hare* (a), the testator, who was in India, executed and sent home two trust settlements in the same terms, one of them being left blank in the names of the disponees, but with instructions to his agent to complete the duplicate in the event of the perfect copy not arriving. The agent accordingly filled up the blanks as directed. The perfect deed never arrived. The duplicate which had been filled up by the agent was afterwards challenged as a blank deed under the statute 1696, and the Court sustained the objection. In *Abernethy v. Forbes* (b), the validity of a deed of entail was questioned, on the ground that the name of the last substitute had been inserted out-with the presence of the testamentary witnesses. But the Court held the entail to be good as regarded all the heirs other than the party whose name was improperly inserted.

Blanks in Set-
tlements to
Charitable
uses.

A settlement for charitable purposes is not necessarily rendered ineffectual by the occurrence of blanks in the specification of the number of persons intended to be benefited, or the amount of money intended to be set apart for such objects; these being regarded as matters of detail which the testator may competently entrust to the discretion of his trustees (c). But it would seem that a legacy of indefinite amount to an individual is void for uncertainty, unless it is in the nature of a recompense for services rendered, or for a rational cause (d). Indefinite bequests may be made effectual by being coupled with a power to trustees (e).

Marginal Additions and Deletions in Deeds.—With regard to the effect of such alterations, it is necessary to attend to the distinction which has been recognised betwixt tested and holograph

(a) *Pentland v. Hare*, 22 May 1829, 7 S. 646.

(b) *Abernethy v. Forbes*, 16 Jan. 1835, 13 S. 263.

(c) *Hill v. Burns*, 14 Apr. 1826, 2 W. & S. 80, affirming 3 S. 389; *Crichton v. Grierson*, 25 July 1828, 3 W. & S. 329, affg. 4 S. 553; *Mags. of Dundee v. Morris*, 1 May 1858, 3

Macqueen, 134, 154, overruling *Ewen v. Mags. of Montrose*, 17 Nov. 1830, 4 W. & S. 346. See *infra*, Chapter VIII. (Implied Trusts).

(d) *Stewart v. Stewart*, 26 Nov. 1813, F. C.

(e) *Murray v. Fleming*, 1749, M. 4075; *Snodgrass v. Buchanan*, 1806, M., Serv. of Heirs, No. 1.

deeds,—a distinction which, since the decision in the case of the *Magistrates of Dundee v. Morris* (a), has come to have a most important bearing upon the law of wills.

Since the time of the institutional writers it has been a settled point in our law, that substantial alterations in an instrument *not holograph* are fatal to it, the reason being that they are presumed to have been made after execution (b); and we are not aware that any good ground exists for the distinction (recognised, certainly, in some of the cases) between alterations written *in manu aliena* and such as are holograph of the granter. On the question, what are substantial alterations—much diversity of opinion has prevailed. Some points, however, are clearly settled. Thus, the name of the grantee, if he takes a beneficial interest, is substantial (c). The date at which an obligation is prestable is also a material part of the deed (d), and also the sum stipulated (e). Any alteration in the testing clause is almost always fatal; as, for example, in the date (f), or in the number of the pages (g). In an entail, the restraining clauses are, of course, substantial (h).

In *Grants v. Shepherd* (i), in which an entail was cut down because the name and designation of *the first* heir substitute was written on an erasure in the dispositive clause, Lord Lyndhurst observed: “The deed therefore being clearly improbable, no evidence can be admitted to prove when or by whom the alterations were made; and there is nothing on the face of the deed itself to show that the alterations were made before the execution. . . . The presumption of law therefore is, that they were made afterwards” (k). But this statement of opinion, which would seem to predicate the absolute nullity of all deeds vitiated in the name of one of the

Alterations in
Deeds not
Holograph.

*Grants v.
Shepherd.*

(a) *Mags. of Dundee v. Morris*, 1 May 1858, 3 Macq. 134.

(b) *Stair*, 4, 42, 19; *Ersk.* 3, 2, 20; *Balfour's Practicks*, 368; *Mags. of Dundee v. Morris*, 3 Macq. 152, per Lord Chelmsford, C.

(c) *Shepherd v. Grant's Trs.*, 21 July 1847, 6 Bell, 153, affirming 6 D. 464; *Reid v. Kedder*, 30 July 1840, 1 Rob. 183, affirming 13 S. 619.

(d) *Kirkwood v. Patrick*, 25 June 1847, 9 D. 1361.

(e) *Lawrie v. Reid*, 1712, M. 12284.

(f) *Smith v. Rankine*, 30 July 1840, 1 Rob. 173.

(g) *Morrison v. Nisbet*, 30 June 1829, 7 S. 810; *Gaywood v. M'Keand*, 19 June 1828, 6 S. 991; *Cassilis v. Kennedy*, 2 June 1831, 9 S. 663.

(h) *Fraser v. Fraser*, 11 Mar. 1854, 16 D. 863.

(i) *Grants v. Shepherd*, 21 July 1847, 6 Bell, 153.

(k) 6 Bell, 171.

grantees, was afterwards qualified. "There is no doubt," his Lordship continued, "that a deed may be good in part and bad in part. Where there are two independent provisions, the one may be vitiated by erasure and the other may prevail, as in the case of a deed giving a legacy to A. and another to B. If the legacy to A. be vitiated by erasure, yet the legacy to B. would remain good. So also, where there is a grant of an estate with a series of substitutions, and one of the later substitutions fails by reason of an erasure, that would not affect the previous estates. This was decided in the *Balbeithan* case (a), and, as it would seem, on the ground of those estates not being dependent on the subsequent limitation" (b).

Trustee's name
not essential.

It is on the principle here enunciated by Lord Lyndhurst (that vitiations in the name of a grantee affect only the particular estate limited to him) that we may most satisfactorily rest the decisions supporting deeds of settlement, notwithstanding the entire destruction of the clause of disposition to trustees. In the earlier cases (c), the difficulty seems to have been got over by holding that the deletion of the name of one trustee was immaterial, because there remained a sufficient conveyance in favour of the others. In *Robertson v. Ogilvie's Trustees* (d)—a case in which the names of three out of seven trustees were delete from the will—the decision went partly on this ground, and partly on the ground that the codicil in which the erasure occurred was holograph. But the principle, that the beneficial interest may subsist notwithstanding the destruction by deletion of the conveyance of the legal estate, was distinctly enunciated by Lord Fullerton in the following passage:—"In the first place, the whole beneficial interests created by the deed are left uncanceled and untouched. They remain the unequivocal expression of the granter's intentions, and form, in truth, the substantial of such a deed. The trust is nothing but the machinery for carrying those intentions into effect; and, so far from being essential to the support of the beneficial interests, it is well known that these interests are protected, and means taken for carrying the granter's intentions regarding them into effect, after the whole apparatus con-

(a) *Abernethie v. Forbes*, 16 Jan. 16949; *Earl of Traquair v. Henderson*, 26 June 1822, 1 S. 527.

(b) 6 Bell, 172.

(c) *Kemp v. Ferguson*, 1802, M. Dec. 1844, 7 D. 236.

(d) *Robertson v. Ogilvie's Trs.*, 20

trived by him for that effect has irrecoverably fallen to the ground. This consideration would go far to support a defence, much more general than is necessary in the present case, as it affords a strong analogy in favour of the proposition, that a total failure of the appointment of trustees, in consequence of erasure in all the names, might not be fatal to the deed" (a).

The views expressed in this passage have received full effect in a recent decision of the First Division (b), in which a trust disposition of heritable property written *in manu aliena* was sustained, notwithstanding the deletion of the names of the whole of the trust-disponees. The case is interesting also, as showing the importance attached to marginal additions in the handwriting of the testator. The truster had indorsed on the margin of the deed, and opposite the deletion, the words, "Managers of the Royal Infirmary for the time being," and the Court held that those words might receive effect as a separate memorandum appointing the Managers of the Infirmary for the time being trustees of the settlement (c). On the same principle, a marginal note, holograph of the testator, added to a tested deed, leaving "to A. B. the sum of L.20 a-year, provided she has not already got it in my lifetime," was sustained to the effect of qualifying an annuity of the same amount, specified in the body of the deed (d).

Alterations in
the Testator's
hand.

The case of *Peddie v. Doig's Trs.* (e), in which a codicil was attempted to be reduced on the ground that the precept of sasine was written on an erasure, raised the important question, whether, in the event of a codicil being vitiated *in essentialibus*, the settlement to which it referred could be sustained. The judges seem to have been of opinion, that if the vitiation were such as to destroy the authenticity of the codicil as the expression of the testator's last will, it would be equally fatal to the settlement, because the presumption was, that the vitiation had taken place after subscription. The

Vitiation of
part of a mul-
tiform Settle-
ment.

(a) 7 D. 245-6.

(b) *Royal Infirmary of Edin. v. Lord Advocate*, 28 June 1861, 23 D. 1213.

(c) On this point see Dig. xxvii. 4, 3; *Kennedy v. Arbuthnot*, 1722, M. 1681; and *Richardson v. Carruthers* 19 Dec. 1845, 8 D. 315, where a nomination of A., whom failing, B., to be

the testator's executor, was sustained, although the word "whom" was written on an erasure.

(d) *Horsbrugh v. Horsbrugh*, 1 Mar. 1848, 10 D. 824.

(e) *Peddie v. Doig's Trs.*, 12 June 1857, 19 D. 820.

case was distinguished from that of a codicil insufficiently authenticated, and which was null *ab initio*; whereas if the testator really had altered his settlement by a valid codicil, the true import of which could not by reason of vitiation be ascertained, it would seem that the revival of the settlement would in effect be making a new will for the testator (a). But as their Lordships were of opinion that the insertion of the precept was not an alteration *in essentialibus*, the question remained undecided.

Omission to
name Trustees.

In the case of a total omission to name trustees, the Court will supply the necessary machinery of administration by appointing a judicial factor to execute the trust (b).

Holograph Al-
terations do
not affect the
authenticity.

Alterations on Holograph Deeds.—The principles applicable to the vitiation of tested deeds have never been applied with the same rigour to holograph writings. And, since the decision of the House of Lords in the *Morgan* will case (c), it may well be doubted whether any conceivable amount of alteration in a holograph will would have the effect of rendering it improbable. A tested deed, to be effectual in law, must appear to be a deed that has never been changed, so that the subscription may prove the whole deed. If part of it appear to have been changed, it cannot be known with certainty what was the state of the document at the time when it was authenticated by the granter's subscription. But the authenticity of a holograph deed does not wholly depend on the signature. In the case of *Robertson v. Ogilvie's Trs.* (d), Lord Mackenzie observed, in a passage quoted with approbation in the *Morgan* case: "A holograph deed depends mainly on the handwriting of the granter, in which it is proved or admitted to be. Then the ordinary doctrine of erasure and superinduction cannot apply; for there is no room to say that the alteration or change was not made by the granter. On the contrary, being in his handwriting proves that it was made by him; so that it stands in the same situation as an ordinary deed, when it has an express clause mentioning that the alteration was made by the granter" (e).

(a) 19 D. 828.

(b) *Pet. Melville*, 8 Mar. 1856, 18 D. 788.

(c) *Mags. of Dundee v. Morris*, *infra*.

(d) *Robertson v. Ogilvie's Trs.*, 20 Dec. 1844, 7 D. 236.

(e) 7 D. 242. The cases mentioned in the last page are a *fortiori* confirmation of the argument.

In the case of the *Magistrates of Dundee v. Morris* (a), the House of Lords gave effect to a holograph memorandum indorsed on a will, annulling what was written on the previous pages, and declaring the granter's intention to establish an hospital in Dundee, as therein described. A portion of the clause descriptive of the foundation was deleted, including the word "hospital;" so that, unless the deleted passage were read, there was no specification of the purpose of the trust. Their Lordships sustained the memorandum; and being of opinion that the deletion of the word "hospital" was accidental, they held themselves entitled to read it, for the purpose of completing the sense of the preceding passage; although, in construing the writing, they held that the deleted portion could not receive effect as a substantive provision. In the subsequent case of *Chapman v. Macbean's Trs.* (b), the Court sustained the validity of a short codicil, which, besides being so ungrammatically expressed as to be almost unintelligible, contained a material error in the name of the legatee, partially corrected by deletion; the Lord Justice-Clerk, referring to the case of *Morris*, said: "If it is necessary to make sense of the deed, you must read the part of it obliterated as if it was not obliterated,—a doctrine very new to me certainly, but which I must now subscribe to."

Effect of Memorandum written on Original Deed.

It is almost superfluous to say, that unsigned marginal additions and interlineations in a holograph writing may be read as part of the original document; the validity of which they do not affect (c). But in a question of death-bed, the date of such alterations must be established by independent evidence (d). We have already seen that unimportant additions to tested deeds may receive effect as holograph memoranda of alterations (e), if it appear that the testator intended them to have that effect (f).

Authentication and Date of Holograph Additions.

(a) *Mags. of Dundee v. Morris*, 1 May 1858, 3 Macq. 134.

(b) *Chapman v. Macbean's Trs.*, 10 Feb. 1860, 22 D. 745.

(c) *Robertson v. Ogilvie's Trs.*, *supra*; *Grant v. Stoddart*, 27 Feb. 1849, 11 D. 860; *Kemps v. Ferguson*, 1802, M. 16949; *Bruce v. Stewart*, 1666, 2 Br. Sup. 427.

(d) *Durie v. Gibson*, 1667, M.

16927; *Johnstone v. Johnstone*, 1688, M. 17063.

(e) *Horsbrugh v. Horsbrugh*, 1 Mar. 1848, 10 D. 824. See *Nasmyth v. Hare*, 27 July 1821, 1 S. Ap. Ca. 65.

(f) We have not thought it expedient to advert to English authorities relative to the authentication of deeds of trust; because, on a matter which is in the strictest sense *positivi juris*,

SECTION II.

ADOPTION OF CODICILS AND INFORMAL WRITINGS.

Adoption necessary to validate informal writings.

Prior to the case of *Wilson's Trs.*, there was no instance of a testamentary deed signed by the testator having been sustained, which was neither holograph, tested in terms of the statutes, nor adopted by reference in a subsequent authentic testamentary writing (a). In the case of *Rankine v. Reid* (b), an attempt was made to support a codicil neither tested nor holograph upon the plea of favour to testamentary writings, but the plea was overruled. Probably there is no class of writings which has furnished so many examples of the danger of neglecting the formalities of attestation, as that of wills and testamentary settlements. In other cases, a deed may be set up by the help of the plea of a *rei interventus*; but an objection to the formality of a testamentary settlement is almost always fatal (c).

Adoption by separate Writing.

Adoption of informal writings by reference may be in either of the following ways:—(1) A testator may, in his holograph or tested settlement, adopt a *previously written* paper, which may be either holograph and unsigned, or signed but not holograph, or neither holograph nor signed. The adoption, to be effectual, must be in express terms, and the writing intended to be adopted must be so described as to be capable of identification (d). (2) A testator sometimes declares that informal memoranda, *to be afterwards written*, shall be binding on his trustees, in the same manner as if they had formed part of the settlement. But inasmuch as documents not yet written cannot be identified by reference, the same necessity would seem to exist for the authentication of such memoranda as in the case of a regular settlement. However, it has been held that a testator may by anticipation give authenticity to informal

foreign authority is more likely to mislead than to illustrate.

(a) *Wilson's Trs. v. Stirling*, 24 D. 163. Here the codicil was holograph of one of the granters only.

(b) *Rankine v. Reid*, 7 Feb. 1849, 11 D. 543.

(c) It seems, however, that an in-

formal testamentary writing may be homologated (*Logan v. Logan*, 27 Feb. 1823, 2 S. 253). See also *Inglis v. Harper*, 18 Oct. 1831, 5 W. & S. 785, revg. 6 S. 684; *Macmillan v. Macmillan*, 28 Nov. 1850, 13 D. 187.

(d) *Baird v. Jaap*, 15 July 1856, 18 D. 1246; *Inglis v. Harper*, *supra*.

memoranda, to the extent of validating subscription by initials (a). And by the case of *Wilsone's Trs.*, the rule has been so far relaxed that a testator may now adopt by anticipation a signed codicil not holograph (b). It is doubtful whether a testator may not even adopt by anticipation such *unsigned* holograph writings as are truly supplementary to, and not inconsistent with the provisions of the settlement which contains the dispensing clause. We are not aware of any authority on this point (c). The questions that have arisen upon the adoption of testamentary writings, relate chiefly to the identification of memoranda which have been adopted by holograph or tested writings of later date.

The best of all modes of adopting an informal writing, is by a holograph docquet on the writ itself. In *Macintyre v. Macfarlane's Trs.* (d), a will which was neither holograph nor tested was held to be validated by the addition of a short codicil in the testator's hand, commencing with the words, "I add to this." And where a testator, by his deed of settlement, provided that bequests to be afterwards declared should be effectual if written, dated, and signed by himself, and he left *inter alia* two holograph codicils on one sheet of paper, dated at the commencement and signed at the end of the second codicil, the Court held that the signature was sufficient to validate the first codicil also (e).

Adoption by
Indorsement.

(a) *Baird v. Jaap*, *supra*.

(b) *Wilsone's Trs. v. Stirling*, *supra*; see *Rankine v. Reid*, 7 Feb. 1849, 11 D. 543; *Dundas v. Lewis*, 13 May 1807, Hume, 917, M. "Writ," No. 6; and compare *Melvin v. Nicol*, 20 May 1824, 3 S. 31, 1 Ross' L. Ca. 432; *Baird v. Jaap*, *supra*.

(c) See, however, *Gillespie v. Donaldson's Trs.*, *infra*.

(d) *Macintyre v. Macfarlane's Trs.*, 1 Mar. 1821, F.C.

(e) *Gillespie v. Donaldson's Trs.*, 22 Dec. 1831, 10 S. 174. See *Bryson v. Crawford*, 1833, 12 S. 39; *Hamilton v. Moir*, 1710, M. 17028. By the law of England, an attested codicil validates an unauthenticated will written on the same paper. In *De Bathe v. Lord Fingal*, 16 Ves. 167, a will was attested by only one witness; but a

codicil having been appended, attested by three witnesses, in terms of the 10 Car. 2, cap. 24, which was declared to be a codicil to the will thereunto annexed, the attestation was held to apply to the will. And where a will was left blank in the attestation clause, and, a fortnight afterwards, the testator appended a short codicil undated, but signed by three witnesses, the Court of Exchequer held that the attestation applied to the whole of what was written on the paper, on the ground that the codicil contained an express reference to the will (*Doe d. Williams v. Evans*, 1 Cr. & Mees. 42). In the later case of *Guest v. Willasey*, 3 Bing. 614, it was ruled that the execution of one of three codicils on the same sheet of paper was sufficient to validate the whole series, without words of express reference.

By reference to
Memoranda of
same Date.

When the adoption is by a separate deed, it is usual to refer to the adopted paper by its title; and in practice, it has been considered sufficient to refer in contracts, etc., to signed plans and specifications as relative to the contract, without insisting on complete attestation (*a*). So also may a signed inventory of titles be adopted by reference in a conveyance of property. On this principle, where a testator appointed an executor to hold his estate, "subject to the payment of such bequests as I may instruct him to pay, in a letter signed by me, of this date, to the several persons therein named"—the residue to go to the executor—and the testator died two days afterwards, leaving a signed letter of instructions not holograph, the House of Lords decided that the adoption of the letter in the probative will made it effectual, and they directed an issue to try the question, whether the letter founded on was the one referred to in the will (*b*). It is probable that the principles laid down in that case would be extended, so as to sanction the adoption by reference of a *prior* will in a separate paper (*c*).

Whether Sig-
nature is essen-
tial.

It is not even necessary that the document adopted by reference should be subscribed by the party. The mere signature of the party to a document written by a different hand is not authentication; nor is it needed to denote the completion of the writing, that being fixed by the reference in the principal deed. The signature, however, is an important element in the proof of the identity of the writing to which it is adhibited with that referred to in the deed; though the fact of identity may be proved by other evidence (*d*).

Recital not
equivalent to
Adoption.

A mere reference *narrative* to a deed already executed is not

(*a*) See *Wilson v. Glasgow & S. W. Ry. Co.*, 25 July 1851, 14 D. 1; *Aberdeen Ry. Co. v. Blaikie*, 28 Jan. 1851, 13 D. 527.

(*b*) *Inglis v. Harper*, 18 Oct. 1831, 5 W. & S. 785, reversing 6 S. 684; *Stewart v. Watson*, 1791, Bell's Oct. Ca. 225.

(*c*) In the English case of *Aaron v. Aaron*, 3 De Gex & Sm. 475, where an unattested codicil was referred to by a subsequent duly executed codicil, written on a separate paper, it was held that the former was thereby rendered effectual for the devise of real estate. A

detached attested codicil will, of course, not cure the defects of a prior unattested writing not referred to; and a general reference to prior wills and codicils will be held to apply only to such as are regularly attested, if there are such in existence (*Croker v. Marquis of Hertford*, 4 Moore, P.C. Ca. 339; *Allen v. Maddock*, 11 Moore, P.C. Ca. 427).

(*d*) *Russell v. Freen*, 14 May 1835, 13 S. 752; *Gordon v. Anderson*, 15 Feb. 1828, 3 W. & S. 1. As to sufficiency of signature on last sheet, see *Mason v. Skinner*, 16 Jur. 422.

equivalent to adoption. In order to give validity to an informal writing, it must appear that the reference was made for the purpose of importing that writing into the substantive part of the deed (a).

In the case of *Blair v. Blair* (b), it was decided, after very anxious consideration, that a holograph memorandum of instructions to prepare a settlement leaving residue to an eldest son, could not be read for the purpose of controlling the settlement itself, by the terms of which the residue was given, not to the eldest son, but to the whole children equally. "I think," said Lord Moncreiff, "it is most dangerous to say, that a regularly executed deed shall be controlled and perverted from its legal import by reference to an unauthenticated instrument, said to contain instructions of the deceased for making a deed of settlement. Whatever were her instructions, the deed was executed by the testatrix in the terms in which it stands; and we can get her intention nowhere else but in that deed. We know not what circumstances or what considerations may have occurred between the time when the paper of instructions was written and the date of executing the deed" (c). There seems, however, to be some authority for holding that a draft may be referred to for the purpose of correcting mistakes (d).

Paper of Instructions.

The question, whether a document is a testamentary writing or a mere instruction to prepare a will, is for the Court, not for a jury (e).

Forum.

Although, as we have seen, the reservation of a power to alter, by any informal writing, will not obviate objections to the formality of such writings in respect of execution, it will entitle them to a favourable construction in a question as to style. Independently indeed of any reserved power, deeds of alteration are so far privileged that they are binding on trustees of heritable property although informal as to style. For example, the purposes of a trust of heritable property may be declared by testament, if an effectual conveyance has been made in a previous settlement (f). The trust

Liberal construction of Codicils.

(a) *Boswell v. Boswell*, 28 Jan. 1852, 14 D. 378; *Urquhart v. Urquhart*, 20 Feb. 1851, 13 S. 742. 458; *Castell v. Tag*, 1 Curtis, Ecc. 298.

(b) *Blair v. Blair*, 16 Nov. 1849, 12 D. 97. (e) *Maclean v. Maclean's Trs.*, 14 June 1861, 23 D. 1099.

(c) 12 D. 108. (f) *Ballantyne v. Mag. of Ayr*, 17 Jan. 1838, 16 S. 325; *Panton v. Gillies*, 22 Jan. 1824, 2 S. 632; *Cameron v. Mackie*, 29 Aug. 1833, 9 W. & S. 106, affg. 9 S. 601.

(d) *Barstow v. Kilvington*, 5 Vesey, Junior, 593; *Milner v. Milner*, 1 Vesey, 106; *Blackwood v. Damer*, 3 Phil. 106, affg. 9 S. 601.

conveyance itself may also be revoked by a testament (a); but in that case, if the testator, instead of engrafting new purposes on his subsisting settlement, begins by revoking it, and proceeds to make a new settlement of his heritable property without using dispositive words, that will not be operative. The revocation will be effectual, but the estate will result to the heir-at-law (b). The case of *Barclay v. Griffiths* is an example of a declaration of trust in a holograph letter, engrafted on a settlement of heritage (c). A holograph alteration or declaration of purposes will bind the heritable estate, though it should at the same time revoke the appointment of trustees contained in the settlement (d).

SECTION III.

OF REVOCATION (e).

Express and
Implied Revoca-
tion.

The revocation of a deed which the grantor has not put beyond his control may be accomplished in a variety of ways. In the first place, the intention to revoke will be effectual if expressed in a holograph or tested writing (f); and a revocation by testament or English will is effectual to recall a previous conveyance of heritage (g). Secondly, revocation, total or partial, may be implied from the fact, that two settlements executed by the same party are inconsistent with one another; in which case the rule is applied, *posteriora derogant prioribus* (h). Courts of law often experience

(a) *Willoch v. Ochterlony*, 1772, 3 Paton, 659, affg. M. 5539; *Brack v. Johnston*, 23 Nov. 1827, 6 S. 113; *Leith v. Leith*, 6 June 1848, 10 D. 1137; *Purvis' Trs. v. Purvis' Exrs.*, 23 Mar. 1861, 23 D. 812.

(b) See *infra*, p. 63.

(c) *Barclay v. Griffiths*, 4 Mar. 1830, 8 S. 632. But see, *contra*, *Stewart v. Baillie*, 27 Jan. 1841, 3 D. 463.

(d) *Kidd v. Kidd*, 9 June 1843, 5 D. 1187.

(e) Ersk. 3, 3, 40; Bell's Pr. § 1864; Menz. 462, 664.

(f) *Barclay v. Griffiths*, 4 Mar. 1830, 8 S. 632; *Kidd v. Kidd*, 9 June

1843, 5 D. 1187; *Stewart v. Neilson*, 3 Feb. 1860, 22 D. 646.

(g) *Purvis' Trs. v. Purvis*, 23 Mar. 1861, 23 D. 812; *Leith v. Leith*, 6 June 1848, 10 D. 1137; overruling earlier cases, as *Dundas v. Dundas*, 1783, M. 15585, and *Douglas' Trs. v. Douglas*, 1789, M. 15949. See also *Fordyce v. Cockburn*, 5 July 1827, 5 S. 892.

(h) *Mitchelson v. Mitchelson*, 15 Nov. 1820, F. C.; *Burnett v. Burnett*, 1701, M. 15566; *Beattie v. Thomson*, 21 June 1861, 23 D. 1161; and see *contra*, *Dove v. Smith*, 31 May 1827, 5 S. 734.

great difficulty in deciding how many, and which, of the testamentary writings found in the repositories of a deceased person are to be regarded as his last will; and certain arbitrary rules have been devised with the view of aiding in the solution of a problem which would otherwise be insoluble. Settlements executed of the same date are construed as one deed (*a*). On the other hand, a settlement which contains a residuary clause is virtually exclusive of previous testamentary writings (*b*); and a deed which is in point of form a total settlement, is considered to be in its purpose and intention, so irreconcilable with the supposition of a prior subsisting deed, that an undisposed of *share* will be given to the heirs-at-law rather than to the legatees under a previous deed (*c*). But it has been settled by a decision of the whole Court, that if a general settlement with clause of revocation make no provision as to the disposal of a *specific estate*, the heir to whom it was destined under a previous settlement shall take the estate rather than the heir-at-law (*d*). Codicils prior in date to the leading settlement ought not to be admitted, if they are explanatory of a previous settlement which is revoked by implication (*e*). Yet even this rule is subject to exceptions. For example, a bequest of a specific subject is effectual, though anterior in date to the general settlement (*f*). The circumstance that a number of the legacies contained in a prior partial settlement are repeated in a total settlement—that is, that the same sums are given to the same persons—creates a strong presumption that the earlier deed was meant to be revoked (*g*).

Rules of Construction for determining questions of implied revocation.

(*a*) *Fergus v. Fergus*, 7 Feb. 1833, 11 S. 362; *Inglis v. Harper*, 18 Oct. 1831, 5 W. & S. 785, revg. 6 S. 864.

(*b*) *Grant v. Stoddart*, 11 D. 869, per Lord Jeffrey; but see 1 Macq. 163, and *Sellar v. Stephen*, 21 June 1855, 17 D. 975.

(*c*) *Grant v. Stoddart*, 27 Feb. 1849, 11 D. 870.

(*d*) *Allan v. Glasgow's Tr.*, 28 Jan. 1842, 4 D. 494.

(*e*) *Stewart v. Baillie*, 27 Jan. 1841, 3 D. 463.

(*f*) *Fleming v. Fleming*, 1800, M. "Impl. Will," No. 1.

(*g*) Per the L. J.-C. Hope in *Hors-*

brugh v. Horsbrugh, 9 D. 341. "The presumption is always strongly adverse to an unfinished instrument materially altering and controlling a will deliberately framed, regularly executed, recently approved, and supported by previous and uniform dispositive acts; and this presumption is stronger in proportion to the less perfect state of, and the small progress made in, such instrument. To establish such a paper, there must be the fullest proof of capacity, volition, final intention, and involuntary interruption."—(Jarman on Wills, 3d Ed., i. 157.)

Multiform
Wills

Sometimes, instead of a succession of wills, there is found a succession of memoranda bequeathing sums of limited amount. In this class of cases, the only safe and practicable rule of interpretation is, that every memorandum should receive its full effect. The repetition of bequests of the same or similar amount in different memoranda, may create a moral impression that the testator did not intend them to be cumulative; but such impressions are of necessity purely conjectural, and do not constitute a safe ground for judicial interpretation (*a*). The subject of double bequests is discussed in the Third Part of this treatise.

If possible,
both Wills
shall subsist.

Where it appears that two deeds are capable of standing together as one settlement, there is no implied revocation of any particular provision in the first, unless its terms are *necessarily* inconsistent with the second (*b*). The case of *Alves v. Alves* is an illustration. The testator, by his trust settlement, had divided the residue of his estate into two equal shares, to be distributed amongst certain relatives, who, in the concluding part of the clause, were also appointed "residuary legatees." By a codicil, he made a new division of the residue into three shares, as to one of which the purpose had failed. The heirs-at-law claimed this share as intestacy; but the Court held that, although the division into three shares was an implicit revocation of the previous division into two shares, it could not operate a revocation of the general residuary bequest, the two appointments not being incompatible (*c*). The second *Roxburgh* case decided that an implied revocation is only operative if the second deed proves effectual; for if the deed is reduced *ex capite lecti*, or any other extrinsic ground, the inconsistency does not arise (*d*). But an express revocation in a death-bed deed is effectual, although the dispositive provisions may be cut down (*e*).

(*a*) *Horsburgh v. Horsburgh* (1st case), 4 May 1845, 9 D. 324. If the wills are really inconsistent, and the dates cannot be ascertained, so as to determine which is the *last* will, it would seem that both must be sacrificed; but this *ultima ratio* will not be resorted to if it is possible, by subtlety of construction, to educe from both a consistent scheme of disposition.—(Jarman on Wills, 3d Ed., i. 160.)

(*b*) *Grant v. Stoddart*, 11 D. 876, per Lord Fullerton; same case in 1 Macq. 163; *Dove v. Smith*, 31 May 1827, 5 S. 734.

(*c*) *Alves v. Alves*, 8 Mar. 1861, 23 D. 712.

(*d*) *Roxburgh v. Wauchope*, 25 May 1820, 6 Paton, 548; *infra*, 64.

(*e*) *Ker v. Erskine*, 16 Jan. 1851, 13 D. 492,—the latest case.

Revocation of a legacy may be implied by prepayment of a sum of equal amount to the legatee (*a*); but, on the other hand, a legacy will not be presumed to be in payment or satisfaction of a pre-existing obligation (*b*). Revocation is also inferred from any subsequent act of the testator rendering exact fulfilment impossible; *e.g.*, selling the subject, or bequeathing it to another person (*c*). For example, a special legacy of "the sum of L.1000, lent on bond to E. and J.," was held to be evacuated in consequence of the debtor having voluntarily paid up the bond, two years before the testator's death (*d*). And where a testator, by his settlement, directed four houses to be severally conveyed to each of his four nephews, and one of the houses was subsequently purchased by a railway company under their compulsory powers, on the death of the testator without having altered his settlement it was held that the nephew to whom the house had been destined had no claim for its value (*e*).

Revocation by
Prepayment.

A substitution is, in the general case, held to be revoked by changing the destination in a subsequent charter or writ (*f*). But a mere renewal of the grant for special purposes expressed in the deed does not import a revocation of the destination in the previous title (*g*).

Alterations in
the Investiture.

A settlement may also be *de facto* revoked by destroying or cancelling it; the requisites of which are, according to Mr Dickson,—(1.) a final intention to revoke; and (2.) an overt act indicating such an intention (*h*); as in the case of *Nasmyth*, where a testator cancelled his will by tearing off the seal which he had prescribed as a solemnity by the testing clause (*i*); and the more recent cases of *Falconer* and *Dow* (*k*). If the mutilation can be proved to have been

Revocation by
Cancellation.

(*a*) *Robertson v. Robertson's Trs.*, 15 Feb. 1838, 16 S. 554; *Mollison v. Buchanan*, 22 Feb. 1822, 1 S. 346; *Burrell v. Burrell*, 15 May 1828, 6 S. 801. But see *contra*, *Hume v. Stewart*, 26 Nov. 1834, 13 S. 90.

(*b*) *Kippen v. Darley*, 21 May 1858, 3 Macq. 203, affg. 18 D. 1137.

(*c*) *Paul v. Paul's Trs.*, 5 July 1821, 1 S. 104.

(*d*) *Pagan v. Pagan*, 26 Jan. 1838, 16 S. 382.

(*e*) *Chalmers v. Chalmers*, 19 Nov. 1851, 14 D. 57.

(*f*) See *Edgar's Trs. v. Riddell*, 13

Dec. 1811, F. C.; *Zuille v. Morrison*, 4 Mar. 1813, F. C.; *Smith v. Murray*, 9 Dec. 1814, F. C. But it seems that a precept of clare constat would not evacuate a substitution.

(*g*) *Murray v. Smith*, 2 Feb. 1831, 9 S. 378.

(*h*) Dicks. Ev. § 901.

(*i*) *Nasmyth v. Hare*, 27 July 1821, 1 S. Ap. Ca. 65.

(*k*) *Falconer v. Stephen*, 9 Dec. 1848, 11 D. 220; *Dow v. Dow*, 30 June 1848, 10 D. 1465. See also *Houston v. Shaw*, 1711, Rob. 552, 561.

accidental (*a*), or the result of insanity (*b*) or of passion—revocation not being intended (*c*),—in any of these cases there is no cancellation *animo*, and therefore no revocation.

By Procura-
tion.

A party may empower another to revoke or alter his settlement, but such a power will not be raised by implication; nor will an improbative authority to cancel be sustained (*d*). In *Douglas v. Douglas' Trustees*, the testator had added a postscript to a codicil, stating, "I am aware how very incorrect all these writings are, and I hereby empower my brother to alter any part of them he may deem proper." It was held that this direction referred only to corrections in point of form, and that the brother was not thereby empowered to alter the disposal of the residue of the property (*e*).

Cancellation of
Duplicates.

It would seem that the cancellation *animo* of one copy of a deed executed in duplicate will be effectual (*f*). And if the grantee has entrusted the deed to the care of another for the purpose of having it destroyed, and his instructions are neglected (*g*), or if his intention to cancel has been otherwise defeated by the act of an interested party, the revocation will be held to have been completed (*h*).

Effect of Can-
cellation.

A deed cancelled leaves the property in the same situation as if the deed had never existed (*i*), though it may perhaps be looked at for the purpose of ascertaining what was in the mind of the testator before he altered his purpose (*k*). If the cancelled deed is to be regarded as non-existent, it follows that the cancellation of a deed of revocation will revive the deed which had at one time been revoked. This is agreeable to reason, because the revoking deed could not have had any legal effect while it remained undelivered in the hands of the granter (*l*).

(*a*) *Cunninghame v. Mouat's Tr.*, 1851, 13 D. 1376; *Irvine v. Lang*, 1850, 2 D. 804.

(*b*) *Lang v. Bruce*, 20 Nov. 1838, 1 D. 59.

(*c*) *Doe v. Perkes*, 2 B. & Ald. 489.

(*d*) *Logan v. Logan*, 27 Feb. 1823, 2 S. 253.

(*e*) *Monteath Douglas v. Douglas' Trs.*, 30 June 1859, 21 D. 1066.

(*f*) *Burtinshaw v. Gilbert*, 1 Couper, 49; *Onions v. Tyrer*, P. Wms. 346; *Pemberton v. Pemberton*, 13 Ves. 310.

(*g*) *Chisholm v. Chisholm*, 1673, M.

12320. But see *contrà*, *Walker v. Steele*, 16 Dec. 1825, 4 S. 823.

(*h*) *Bibb v. Thomas*, 2 W. Blackst. 1043; *Buchanan v. Paterson*, 1704, M. 15932.

(*i*) But see *contrà*, *Mure v. Mure*, 1 June 1813, F. C.

(*k*) *Adv.-Gen. v. Smith*, 1 Mar. 1852, 14 D. 585, and Exch. Rep.; same case in 1 Macq. 1760; *Mag. of Dundee v. Morris*, 3 Macq. 164, 171.

(*l*) See *Howden v. Howden*, 8 July 1815, F. C.

The revocation of English wills by way of cancellation was sanctioned by the Statute of Frauds (a); and is now regulated by a statute of the present reign (b), which allows a will to be revoked by "burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same." The cases are very numerous; and remembering that decisions on the construction of a statute are never of any great authority as regards the elucidation of the common law, we do not think it desirable to encroach upon our space to the extent that would be requisite for an abstract (c).

English Law.

The exercise of a power of revocation is not regarded in law as a new conveyance: revocation is therefore competent on death-bed; although it is obvious that by the revocation of purposes and conditions, very material alterations may be effected on the quality of the estate. Thus the revocation of a purpose of sale will change the succession from moveable to heritable (d). In *Millar v. Marsh* (e), Lord St Leonards concurred with the judges of the First Division in holding that the maker of an entail might convert it into a fee-simple estate by revoking the fetters on death-bed; for "the death-bed disposition was good to remove the fetters, and it was inoperative with regard to the estates created" (f).

Death-bed Revocation.

A simple reservation in a trust disposition of heritage of a power to name beneficiaries, or to alter the succession *in articulo mortis*, will not avail to exclude reduction *ex capite lecti* of a subsequent deed of appointment (g). But it is possible to give validity by anticipation to a death-bed deed of appointment; and this may be effectually done by inserting in the original trust deed a destination over to other beneficiaries, in the event of a failure to appoint effectually. Thus in the case of *Ker v. Lady Essex Ker's Trustees*, where the testatrix had conveyed her heritable property in *liege poustie* to trustees, with directions to sell and to pay legacies, etc., and then pay the residue to such persons as she should direct by any writing under her hand,

Execution of Reserved Power on Death-bed.

(a) 29 Car. II. cap. 3, § 6.

(b) 1 Vict. cap. 26, § 20.

(c) See Jarman on Wills, 3d Ed., i. 121-136.

(d) *Grindlay v. King*, 8 Nov. 1853, 16 D. 27; and see *Allan v. Glasgow*, 14 Aug. 1846, 5 Bell, 379.

(e) *Millar v. Marsh*, 22 May 1855, 2 Macq. 284; affg. 15 D. 823.

(f) 2 Macq. 287.

(g) *Crawford v. Coutts*, 1795, M. 14958; *Mudie v. Moir*, 1 Mar. 1824, 2 S. Ap. Ca. 9; *Wauchope v. Lady Essex Ker*, 21 Feb. 1812, 5 Paton, 559.

and, in default of such writing, to pay the residue to her next of kin, and she thereafter executed a memorandum of directions on death-bed, which was challenged by the heir-at-law, it was held that the right of challenge was a personal privilege of the heir, and that, as the reduction of the writing of directions would occasion the default, in the event of which the property was to go to the next of kin, he was barred, by want of interest, from insisting in the challenge (a).

Altering the
order of Suc-
cession on
Death-bed.

On similar principles, it has been settled that a death-bed deed *altering* the destination of trust property (e.g., directing it to be conveyed to another person) will be protected from challenge, provided there be no express revocation of the previous deed (b). Against this view, it might be argued, that the implied revocation of the destination in the first deed, arising from its inconsistency with the second, would give the heir-at-law an interest; but this is a fallacy, for implied revocation can only take place where both deeds are operative *per se*, as it arises solely from the necessity of reconciling their provisions. Unless it is the special desire of the testator that his heir-at-law should succeed in the event of his dying within sixty days, the conveyancer should not insert a clause of revocation, but should leave the revocation to be effected by legal implication; for when the original trust settlement or its purposes are revoked *per expressum*, the heir-at-law acquires an interest to reduce the deed of alteration (c).

Where a previous settlement is founded on as a title to exclude the heir's right of challenge, the onus of proving its subsistence rests on the defenders in the reduction (d).

Does Revoca-
tion of second
Settlement re-
vive the first?

The case of *Ker v. Erskine* (e) decided a point of considerable importance in connection with the law of death-bed; which was, that where a settlement has once been effectually revoked, a second deed of revocation, revoking the first revocation, will not, if executed on death-bed, have the effect of reviving the settlement so as

(a) *Ker v. Lady Essex Ker's Trs.*, 1 Oct. 1831, 5 W. & S. 718, 8 S. 694.

(b) *Duke of Roxburgh v. Wauchope*, 25 May 1820, 6 Paton, 548. See Prof. Bell's remark, Com., 5th Ed. I. 95, n. 7.

(c) *Stewart v. Neilson*, 3 Feb. 1860,

22 D. 646; *Erskine v. Erskine's Trs.*, 3 Dec. 1850, 13 D. 223.

(d) *Clyne v. Clyne's Trs.*, 12 May 1837, 15 S. 911.

(e) *Ker v. Erskine*, 16 Jan. 1851, 13 D. 492.

to exclude challenge by the heir-at-law. The Lord President Boyle thus explained the ground of the decision :—"It is clear in law, that however capable to revoke all former settlements, a death-bed deed can operate no effectual conveyance of heritable property, or exclude the heir-at-law, unless he stands already effectually excluded by an existing settlement. The testator revoking his revocation with the view of reviving an extinguished deed, cannot make it operative to the prejudice of the heir, who had been excluded by the extinguished deed. No deed previously cancelled can be restored by a deed executed on death-bed; and no evidence of the continued favourable intention to serve the interest of the party whose right had been previously set aside, can be set up or regarded for that purpose" (a). A testator who is desirous of reviving a revoked settlement without incurring the risk of challenge, should cancel the deed of revocation, or put it in the fire in presence of witnesses. The effect of this will be, that the deed of revocation having never been delivered, and being non-existent at the testator's death, will not be regarded as a completed instrument, and the original settlement will take effect as of the date which it bears (b).

SECTION IV.

OF DELIVERY.

When rightly understood, the general rule, that deeds are only rendered operative by delivery, admits of only one exception. The recognition of this maxim will greatly facilitate the explication of the class of cases usually called exceptional, but which are either examples of *constructive delivery*, or referable to the category of testamentary deeds. Three of these may be classed together; namely, deeds containing a clause dispensing with delivery, deeds reserving the grantor's liferent, and testamentary deeds. The truth is, that deeds in the first two of the classes we have mentioned, are only effectual without delivery when they happen to be also testamentary. Suppose that a proprietor executes a *de presenti* convey-

Delivery essential, except in the case of testamentary writings.

(a) 13 D. 495.

(b) See *Howden v. Howdens*, 8 July 1815, F.C.

ance of his estate with all the formalities that ingenuity can suggest, and adds to it a clause dispensing with delivery, if he keeps it locked up in his desk, and afterwards destroys it, will it be said that the disponent has thereby acquired a title to the estate? Doubtless, if it is found after death in his repositories, it will be effectual; not, however, because of the clause of dispensation, but because it will be presumed to have been executed *intuitu mortis*. Applying the same test to deeds in which the grantor has a life interest, and which, according to Erskine (a), are effectual without delivery, it is clear that the grantor may revoke the conveyance of the fee while he keeps the deed undelivered in his possession.

Trusts for
Creditors.

The case of a trust for creditors can scarcely be considered an exception to the rule. The grantor, it is true, retains the corpus of the estate, and may dispose of it, subject to the burden of the trust, notwithstanding that the trustee has taken infestment on a delivered deed of trust. But in the case supposed the conveyance is subject only to the reversionary interest of the grantor, who, though he may resume possession, cannot destroy the purposes to which it has been appropriated by his own act (b).

Effect of re-
serving the
Grantor's Life-
rent.

The true principle is, that the grantor of any deed is entitled to revoke it while the *deed* itself and the *property* conveyed by it remain subject to his control; but that after death, the deed, being then irrevocable, is from the necessity of the case effectual without delivery. Delivery, however, will not bar revocation of a trust deed in which the grantor's life interest is reserved, unless a beneficial and indefeasible right is thereby conferred on a party then in existence. Thus, where a mutual post-nuptial settlement was revoked by the wife as a *donatio inter virum et uxorem*, and the revocation was objected to on the ground that the settlement conferred certain rights upon the lady's daughter—for whose behoof, it was argued, the deed must be held to have been retained—the Court found that the right in question was not a *jus quæsitum tertii*, but only a *spes successionis*, which could not bar the grantor's right to revoke (c).

(a) Ersk. 3, 2, 44; and see *Brack v. Hogg*, 25 Feb. 1831, 5 W. & S. 68, per Lord Lyndhurst.

(b) On the recal of mandates and trusts *inter vivos*, see *Stair*, 1, 12, 8; *Campbell v. Edderline's Cred.*, 14 Jan.

1801, M. "Adjud." No. 11; *Macmillan v. Campbell*, 4 Mar. 1831, 9 S. 551 (affd. 28 June 1832, 10 S. 863).

(c) *Fernie v. Fernie*, 20 Dec. 1854, 17 D. 233. See *Galloway v. Craig*, 17 July 1861, 23 D. (Ap. Ca.) 12.

The case of *Murison v. Dick* (a) affords a good illustration of the principle. A married lady, represented by the pursuers of the action, had, immediately on coming of age, and shortly before her marriage, been induced to execute a trust conveyance of her whole property for the benefit of children *nascituri*, and failing them, for her next of kin, reserving her own liferent. Soon afterwards she executed an ante-nuptial contract revoking the previous settlement, and appointing other trustees; at whose instance a reduction and declarator of nullity of the first settlement was afterwards brought. On behalf of the lady, it was argued that she was entitled to have the deed reduced as having been granted inconsiderately; but Lord Rutherford, Ordinary, while expressing great doubts as to the sufficiency of that ground of action, decided without hesitation, that the deed was revocable in its own nature, on the ground that there was no *jus quæsitum* in the parties for whom the trustees were to hold. "That a party may grant an irrevocable deed," he observed, "and put it beyond his power by delivery, and vest effectually the property so conveyed against his own subsequent acts and deeds, for the benefit of existing parties in whom by that deed he creates an interest, there can be no doubt. But such a case has no resemblance to the present There was no beneficiary in whom a *jus quæsitum* could be vested. Upon the principle now contended for, it must have remained good all her life; and was it to be held that by such a deed she could reduce herself directly to the state of an alimentary liferenter merely of her own property, in favour of parties not existing, who never might exist, and whose possible existence was not yet the subject of any contract with any existing party?" (b). It was on this ground also that the majority of the Court rested their affirmance of his Lordship's interlocutor. In the case of *Dow v. Beith* (c), the Court went very far in allowing the reduction of one of two deeds constituting a mutual settlement, and in regard to which constructive delivery had therefore taken place. But the case was complicated with allegations of facility and circumvention, and the decision is not of much value as a precedent.

Murison v. Dick.

(a) *Murison v. Dick*, 10 Feb. 1854, 16 D. 529. *Torry Anderson's case*, 2 June 1837, 15 S. 1073.
 (b) 16 D. 532. Compare this with (c) *Dow v. Beith*, 11 Mar. 1856, 18 D. 820.

Delivery of
Deeds *inter
 vivos*.

There can be no doubt, however, that the delivery, actual or constructive, of a deed to a party beneficially interested in its provisions, or to trustees for his behoof, will completely bar the power of the granter's revocation, unless such power be expressly reserved. Thus, in the case of *Turnbulls v. Tawse* (a), a trust was created by a lady for the purpose of conveying the residue of her property to her children *nominatim*, after payment of a certain debt, and under reservation of an annuity to herself. By a supplementary trust deed she attempted to increase the amount of the debt forming a burden upon the property. Delivery having taken place constructively by infestment, it was held that the second deed could not affect the interest given to the children.

Smitton v. Tod.

In the case of *Smitton v. Tod* (b), a proprietor of heritable subjects, on the narrative that he was incapable from facility of profitably conducting his affairs, conveyed all his property to trustees for the purpose, after payment of debts, of providing an alimentary annuity to his wife, to be continued on her death to himself, the residue being destined to the children of the marriage, of whom there were two already born at the date of the deed. The trustees took delivery by infestment. It was strenuously maintained that this deed was revocable as a post-nuptial contract; but the Court held that the children had acquired a vested interest in the estate, which was sufficient to exclude the power of revocation.

Whether Gran-
ter's interest
in *acquirenda*
can be ex-
cluded.

Upon these decisions we may observe, that although a settlor may, by a deed creating a *jus quæsitum*, divest himself of property then in his possession, it has never been decided that he can dispose of *res acquirenda* in the same manner. And it appears to us that it would be contrary to the policy of law to permit such an absolute renunciation of the rights of property by a party possessed of capacity to execute a deed. In the case of *Wright v. Harley* (c), where there was a general trust conveyance of *acquisita et acquirenda* for the purpose of alimentering the granter, and appropriating the balance of the annual income to the support of his wife and family, it was held by the majority of the Court, that the interests

(a) *Turnbulls v. Tawse*, 15 April 1825, 1 W. & S. 80, reversing 2 S. 1; *Duguid v. Caddall's Trs.*, 9 S. 844; *Miller v. Milne's Trs.*, 21 D. 377.

(b) *Smitton v. Tod*, 12 Dec. 1839, 2 D. 225.

(c) *Wright v. Harley*, 2 June 1847, 9 D. 1151.

of the wife and children were preferable to the right of the creditor in a debt contracted subsequent to the publication of the deed. The Court seemed to have felt great difficulty in recognising the husband's alimentary interest to any effect; and there is certainly much force in the observations of Lord Fullerton, who held that the deed was ineffectual against creditors—that it was in substance a mere trust for managing the husband's property, on the ground that he was not able to manage it himself, and incapable of operating a divestiture of the property (a).

It is obvious that a deed which confers an irrevocable right upon pupil children, cannot be recalled by a deed consented to by their father in his character of tutor and administrator. And accordingly, where such a revocation was executed by the parents of the children, the Court reduced the deed in an action at the instance of the children's representatives (b). And it was observed, that the children's knowledge of their legal rights during minority lent no support to a plea of homologation in a question with their representatives.

Interest of Minor Children.

In considering the question, whether a settlement has been made irrevocable by delivery, it is useful to keep in view the various modes in which the granter may give delivery constructively, without parting with the custody of the writing. Without entering on a formal discussion of the subject, it will be sufficient to refer briefly to such cases of constructive delivery as illustrate the law in regard to the revocation of settlements. The cases of *Smitton* and *Wright*, already referred to, are examples of constructive delivery by giving infestment and putting the settlement upon record. Delivery by infestment is effectual on the principle, that the subject itself is transferred to the grantee. And, on the same principle, we think that delivery of a moveable subject in implement of a settlement would be recognised as an equipolent to the delivery of the settlement itself as regards that subject (c).

Constructive delivery of Settlements.

The doctrine has been laid down in very general terms by writers on the law of evidence (d), that deeds in favour of the granter's

Presumed delivery to Granter's Family.

(a) 9 D. 1159. See *Morris v. Sprot*, 27 June 1846, 8 D. 918. As to the validity of such trusts, see Chapter VI.

(b) *Macgibbon v. Macgibbon*, 5 Mar. 1852, 14 D. 605.

(c) See Bell's Com., 5th Ed. I. 276, as to Tradition.

(d) See Dicks. Ev. 485, and authorities there referred to.

wife or children are effectual without delivery, on the ground that the father of a family is the proper custodian of writings in their favour. An examination of the authorities will show that nothing more is intended by this proposition, than that provisions, though conceived in the form of deeds *inter vivos* in favour of members of the grantor's family, will be effectual if found undelivered in his repositories after his death (a). It never could be seriously maintained that the retention of such provisions by the grantor could have the effect of barring revocation; and for this obvious reason, that it could not be known until after his death whether he intended to hold them as delivered deeds. Accordingly, it was assumed in the case of *Downie v. Mackillop* (b), that a bond of provision in favour of the grantor's daughters, which bore to be irrevocable, would not have been effectual *inter vivos* had it remained in the father's possession; although, in consequence of its having been delivered to trustees, and by them put upon the record, it was held to be irrevocable. Lord Cuninghame, Ordinary, observed:—"The deed bore expressly in terms that it was 'irrevocable.' It was necessary, with reference to the purpose that called it forth, that it should be so framed; and without delivery no honest practitioner could have assured these young ladies (or rather their friends, who had interfered at the time very zealously and anxiously on their behalf), that the deed afforded them the slightest benefit or security" (c).

In Questions
with third
Parties

A deed in favour of the grantor's family is, although undelivered, regarded as a completed document to other effects. Thus, in the case of *Forrest v. Wilson* (d), an undelivered deed of settlement having been recovered under a diligence, was held to afford real evidence of a transaction, under which certain sums mentioned in the narrative clause had been paid to the grantor.

Mutual Settlements.

In *Fernie v. Colquhoun's Trs.* (e), it seems to have been assumed that post-nuptial contracts of marriage were effectual without delivery. For the argument was confined to the questions, whether the deed was, in the circumstances, revocable as a *donatio inter virum et uxorem*; and whether such a vested interest was conferred on the

(a) *Stair*, 1, 7, 14; *Ersk.* 3, 2, 44; *Bell's Prin.* § 24; *Forrest v. Wilson*, 1 July 1858, 20 D. 1201.

(b) *Downie v. Mackillop*, 5 Dec. 1843, 6 D. 180.

(c) 6 D. 182.

(d) *Forrest v. Wilson*, 1 July 1858, 20 D. 1201.

(e) *Fernie v. Colquhoun's Trs.*, 20 Dec. 1854, 17 D. 233.

children of the marriage as would exclude the power of revocation. The case of *Brown v. The Advocate-General* (a) is also illustrative of the doctrine of the constructive delivery of mutual settlements. The appellants, along with their deceased sister, had executed a mutual settlement of their whole estate and effects in favour of each other, and to the heirs and assignees of the last survivor. Lords Jeffrey and Cuninghame, in the Court of Exchequer, decided that this was a testamentary disposition, and therefore chargeable with legacy duty; though the former learned judge had a very decided opinion that the deed was irrevocable, and that "after the execution of that deed, she (the deceased) had no longer any separate property in her own slippers or under-petticoats, and could not give a cast-gown to the waiting woman without a vote of the whole sisterhood" (b). Lord St Leonards, without carrying the notion of community of interest to that extreme, gave effect to the disposition as a delivered, and therefore irrevocable, conveyance *inter vivos*.

Constructive
delivery of mu-
tual settle-
ments.

With respect to the claims of creditors his Lordship added:—"The debts provided for by this instrument are such as might be contracted by any of the sisters during their lives; and I think it clear that those debts were a charge not upon the share of each only, but a charge upon the whole fund. It was argued at the bar that that would lead to great absurdity and inconvenience. It might; but it was not an illegal provision, and it must be remembered that these ladies were not likely to feel any embarrassment from such a stipulation" (c).

The effect of actual delivery to the grantee, as distinguished from mere retention for his behoof, in divesting the granter, and excluding the claims of his creditors, is seen in the cases relating to conveyances in fraud of legitim. Thus in *Hogg v. Hogg* (d), where a father conveyed bank stock to his son *inter vivos*, subject to a latent understanding that he would invest the produce in land after the father's death, the dividends being drawn in the meantime by the father, it was declared by the House of Lords, reversing the decision of the Court of Session, that the shares in question "ought to

Delivery *inter
vivos* to defeat
Legitim.

(a) *Brown v. The Adv.-Gen.*, 28 June 1852, 1 Macq. 79; revg. judgment of Court of Ex., 3 Feb. 1849, Exch. Rep.

(b) 1 Macq. p. 81.

(c) 1 Macq. 90. See *Wilson's Trs. v. Stirling*, 13 Dec. 1863, 24 D. 163.

(d) *Hogg v. Hogg*, 1804, M. "Legitim," No. 3.

be considered as subject to the pursuer's claim of legitim." While in the recent case of *Collie* (a), where the bond was delivered to trustees, with the explanation that he wished it to be made an irrevocable and final deed, such delivery was held effectual to exclude the bond from the legitim fund.

Revivor of Revoked Settlement by delivery.

In the case of *Kerr v. Erskine* (b), it was decided that a conveyance which has been revoked is not revived by merely delivering the document to the trustees, enclosed in a sealed packet, which was not to be opened till after the granter's death.

Deeds in the custody of a Trustee.

Mr Erskine (c), commenting upon Lord Stair's doctrine (d), that deeds in the hands of a third person are presumed to have been delivered for the grantee's behoof, unless the contrary be proved by the writing or oath of the grantee, remarks, that in special cases the purpose of such depositions may be proved not only by the grantee, but by the oaths of the writer and testamentary witnesses. But he adds: "After a deed appears in the custody of the grantee, the presumption of delivery to him is so strong, that it can in no case be elided but by his own oath or writing (*Mack. § 6, h. t.*); and if the delivery be confessed by the granter or his representatives, the deed becomes the absolute right of the grantee, not to be defeated under the pretence of its having been granted in trust, unless the trust be proved either by the signed declaration or by the oath of the trustee" (e).

Qualification of Erskine's doctrine.

On this passage Lord President M'Neill observed: "The doctrine of Erskine upon the subject is not to be taken without qualification, otherwise it is not very clear on what ground an issue could be granted; for the matter would be reduced to a presumption in favour of the grantee, which is not the state of the law as an absolute proposition. A party may have possession of a deed, and the presumption of law may generally be, that that party being the beneficiary under the deed, it was delivered to him for the purpose of being so held by him. But that proposition may undergo many qualifications, and the whole circumstances of each case must be

(a) *Collie v. Pirie's Trs.*, 22 Jan. 1851, 13 D. 506. See also *Kerr v. Kerr*, 1676, M. 3248; *Lindores v. Stewart*, 1714, M. 7735; *Milroy v. Milroy*, 31 May 1803, Hume, 285.

(b) *Kerr v. Erskine*, 16 Jan. 1851, 13 D. 492.

(c) Ersk. 3, 2, 43.

(d) Stair, 4, 42, 8. See cases cited in Dicks. Ev. 977.

(e) See Dicks. Ev. § 960 *et seq.*

looked at" (a). In this case the question was between the grantee of the deed and the beneficiary under a subsequent settlement, and the issue put the question, whether the deed was, prior to a certain date, delivered by A. to B.,—thereby throwing the onus of proving delivery upon the grantee in possession; and the evidence being that the granter had handed the deed to his niece in returning from a visit to his agent, apparently for the purpose of being taken care of, along with his other papers, the Court approved of a verdict, finding that there was no delivery.

The depositions of a gratuitous deed, such as a settlement, with the agent for both parties, is presumed to have been made only for the purpose of delivery in the event of its being found unrevoked after the granter's death (b). Thus, where a husband and wife executed a mutual settlement in favour of the survivor, and the wife afterwards deposited with her agent a deed bearing to be with the husband's consent, and conveying part of the estate to his relations, the deed was held in the circumstances to be undelivered and revocable (c).

Delivery to
Common
Agent.

- (a) *M'Aslan v. Glen*, 17 Feb. 1859, 21 D. 513. See also cases upon the law agent's hypothec, where the deeds have been deposited with an agent who acts for parties having adverse interests; Digest, voce "Agent and Client."
 (b) *Ersk.* 3, 2, 43; *Bell's Prin.* § 23.
 (c) *Brownlee v. Waddell*, 22 Nov. 1831, 10 S. 39.

CHAPTER V.

OF THE PARTIES TO THE CREATION OF TRUSTS.

SECTION I.

OF THE TRUSTER OR SETTLOR (*a*).

As the constitution of a trust is in its nature nothing more than a disposal of property for a particular purpose, it may be laid down as a general rule, that any person possessed of property in a character which entitles him to dispose of it by absolute conveyance, may vest it in a trustee for the purpose of having his intention executed. This rule will exclude those who are subject to legal incapacity.

The Crown.

It is stated by Mr Lewin, on the authority of Bacon (*b*), that the sovereign, if he would create a trust as to his private property, must do so by Letters Patent, which ought to contain in *gremio* the conditions of the trust (*c*). It appears that the royal prerogative has occasionally been used for the creation of trusts to distribute prizes of war in a prescribed form amongst the captors,—a form of conveyance which is held not to vest a *jus quæsitum* in the beneficiaries, but to have the effect of a power of attorney for reducing the property into possession (*d*). By an Act of the 39th & 40th George III. (*e*), the sovereign may bequeath his private personal property in trust by a writing under the sign manual.

(*a*) The word "settlor" has generally been used by the author in place of "truster," because, in the rapid perusal of the text for purposes of reference, the frequent intermingling of words so similar in appearance as truster and trustee has a tendency to perplex the reader and to obscure the sense of the passage.

(*b*) Lewin, Tr., 4th Ed. 20.

(*c*) *Fordyce v. Willis*, 3 B. C. Ca. 577.

(*d*) Lewin, Tr., 4th Ed. 21; *Alexander v. Duke of Wellington*, 2 R. & M. 35.

(*e*) 39 & 40 Geo. III. c. 88, § 10.

Corporations.

Corporations created by Letters Patent or Act of Parliament, being at common law possessed of all the proprietary rights of persons, are entitled to alienate their property, in so far as not restrained by their charters; and it would seem that the same powers are possessed by those subordinate institutions incorporated by seal of cause by the magistrates of royal burghs and superiors of burghs of barony (*a*). To prevent the abuse of the powers of alienation possessed by municipal corporations in Scotland, an Act was passed in the reign of George IV. (*b*), which declares "that it shall not be lawful for the magistrates or town council of any burgh to contract any debt, grant any obligation, make any agreement, or enter into any engagement which shall have the effect of binding them or their successors in office, unless an act of council shall have been previously made on that behalf."

Joint Stock Companies.

The Joint Stock Companies Act, 1856 (*c*), incorporates trading companies consisting of seven or more partners, and registered under the provisions of the Act. Such companies may hold lands for the purposes of their business; but no company that is not for the time being carrying on business having gain for its object, can hold more than two acres of land without license from the Board of Trade (*d*). Joint stock companies, it would seem, therefore, have the capacity to execute trusts of heritable or moveable property, which may either be authenticated by the common seal of the company or executed by their mandatory under a power of attorney (*e*). With regard to conveyances of heritable property, it is enacted that in all such deeds "there shall be implied, unless words expressly excluding such implication are contained therein, an obligation of absolute warrandice, and an obligation to complete the company's title at its own expense, so far as necessary to validate or give effect to such disposition, and an obligation to grant, also at its own expense, any further deeds which may be necessary to render such disposition effectual" (*f*). These provisions may require attention where

(*a*) *Grant v. Cuninghame*, 1747, M. 1097. Before the passing of the Lands Clauses Consolidation Act, it was usual to insert a clause giving the power of alienation in the special Acts.

(*b*) 3 Geo. IV. c. 91, § 11.

(*c*) 19 & 20 Vict. c. 47, § 13; amended by 20 & 21 Vict. c. 14, § 3.

(*d*) §§ 13 & 38.

(*e*) 19 & 20 Vict. c. 47, § 42.

(*f*) § 47.

trust deeds are granted by joint stock companies for behoof of creditors under the powers of voluntary winding-up, conferred upon them by statute.

Private Partnerships.

A partnership may execute a trust of the company estate (a); but, as the firm cannot hold lands, it will be necessary, if its beneficial interest in heritable property is to be conveyed to a trustee, that the partners in whom such property is vested should execute a trust conveyance of the property.

Married Women.

A married woman may convey her heritable property to a trustee by deed *inter vivos*, with the consent of her husband as her administrator (b). But she cannot affect her share of the goods in communion by any deed intended to take effect during her lifetime. A testament or disposition *mortis causa*, by a married woman, of her moveable property is effectual without the husband's consent (c). And it would seem that such a conveyance will carry her interest in the goods in communion in so far as her right to dispose of them is unaffected by the provisions of the Intestate Succession Act (d); that is, it will affect her succession if she survive her husband. Erskine seems to have been of opinion that a disposition *mortis causa* of heritable property might be granted by a married lady, without the consent of her husband as her curator, even though his courtesy were excluded (e). Though we are not aware that this opinion has yet been fortified by judicial decision, it seems agreeable to principle; and there is certainly no authority for stretching the right of administration to an extent which would enable the husband to defeat the wife's power of testamentary disposition.

Wife's separate Estate.

As regards property settled on a married lady to the exclusion of the husband's marital rights, she is virtually in the same position as if she were single; and accordingly she may grant trusts respecting it, to take effect either *inter vivos* or after her death (f).

(a) For example, a trust for behoof of creditors; as to which, see Chapter XIX. Section I.

(b) Ersk. 1, 6, 27; *Boyle v. Crawford*, 5 Mar. 1822, 1 S. 372; *Dick v. Donald*, 12 Dec. 1826, 2 W. & S. 522. But she has been held entitled to execute a deed of disentail without his consent; *Pet. Brisbane*, 1 Mar. 1850, 12 D. 917.

(c) Ersk. 1, 6, 28; see Poth. Tr. de la Puis. de Mari, No. 42. *Sed quære*, if she can leave a legacy by *donatio mortis causa*; *vide Miller v. Milne's Trs.*, 3 Feb. 1859, 21 D. 377.

(d) 18 Vict. c. 23, § 6.

(e) Ersk. 1, 6, 27. See *Menzies on Conv.* p. 38; 1 *Fraser*, 274; *More's Notes*, 18; *contrà*, *Bankton*, 1, 5, 67.

(f) *Gowan v. Pursell*, 17 May 1822.

In a case under the Entail Amendment Act, the Court authorized a married lady to execute a disentail of her separate property without requiring the concurrence of the husband to the petition, and held that she was entitled to subscribe the instrument of disentail without his consent (*a*). By the Conjugal Rights Act, 1861 (*b*), a wife "deserted" by her husband may apply, by petition to the Court of Session, for an order to protect property which she has acquired, or may acquire, by her own industry, or by succession or otherwise, after the desertion; and by § 4 of the same Act, it is declared that such property shall belong to her as if unmarried. Onerous trusts of property, so protected, are by § 2 effectual, notwithstanding the subsequent recal of the order of protection. It has not yet been decided whether the word "onerous," as used in the statute, will extend to deeds granted for a *rational* cause, such as provisions to the children of the marriage.

In the case of a minor who has curators, the extent of the disability varies according to the purpose of the trust. A minor without curators may alienate his property, heritable or moveable, for onerous or rational causes; and if the consideration be inadequate, he may be restored against the transaction by a reduction within the *quadriennium utile*. If he have curators, his position is so far different that their consent is necessary to validate the transaction. A minor, with or without curators, may execute a testamentary trust for the disposal of his moveable property (*c*). But he cannot, even with his curators' consent, make a settlement of his heritable estate; "for, in order to alter the legal succession of heritage, there must be a *deliberate animus* in the granter of the deed, which cannot be presumed in a minor" (*d*).

Minors and
their Curators.

1 S. 418; *Keggie v. Christie*, 25 May 1815, F. C.; *Clark v. Gibson*, 24 Jan. 1826, 4 S. 388; *Gordon v. Gordon*, 16 Nov. 1832, 11 S. 36.

(*a*) Pet. *Primrose*, 9 Mar. 1850, 12 D. 917. See *Brown v. Bedwell*, 3 Dec. 1830, 9 S. 136; Pet. *Hamilton*, 1777, 5 Br. Sup. 625.

(*b*) 24 & 25 Vict. c. 86, § 1. The word "deserted" is ambiguous.—At common law, it would seem that the wife of a convict has the power of dis-

posing of her acquisitions. See note, *infra*, p. 82.

(*c*) Ersk. 1, 7, 33; Bankt. 1, 7, 59; *Stevenson v. Allan*, 1680, M. 8949; *Campbell v. Reid*, 12 June 1840, 2 D. 1089, per Lord Pr. Hope. The distinction taken by Erskine, between bequests by testament and bequests of moveables by disposition, does not seem to be well founded; see 2 Fraser, 208; More's Notes, 47.

(*d*) Ersk. *supra*; *Cunyngame v. Whiteford*, 1797, M. 8966.

Under the category of rational deeds which a minor may competently grant, we include ante-nuptial contracts, which are so far favoured that they may be even sustained, when reasonable, although granted without the curators' consent (a). With reference to the plea that such deeds are not only reducible but null, Lord Ivory observed: "There are none of our writers on law who say anything as to this nullity who do not concur in the qualification of the doctrine that it is a nullity to be pleaded against injury; and where the deed is for the benefit of the minor, the nullity cannot be pleaded. . . . I do not wish to impugn the general doctrine that deeds entered into by a minor without consent of his curators are null, but only to point out such modifications as the peculiar case of marriage calls for" (b).

Insane Persons.

Amongst objections to trust settlements involving the question of capacity to contract, there is none more frequently urged, or with more fatal effect, than that of insanity (c), or facility, on the part of the truster. Insanity, which imports not only a want of judgment, but a want of *will*—of the disposing mind—is necessarily a fatal objection; but mere *facility* is not of itself a ground of reduction (d); and accordingly the issue in reductions on the ground of facility invariably puts the question, Whether the defender, *taking*

(a) *Bruce v. Hamilton*, 23 Dec. 1854, 17 D. 265; *Davidson v. Hamilton*, 1632, M. 8988; *Young v. Robertson*, 1769, M. 8988.

(b) *Bruce v. Hamilton*, 17 D. 270-2.

(c) A criterion of insanity in the legal sense is still a desideratum. The observations of the Lord President in *M'Kellar v. M'Kellar*, 6 Dec. 1861, 24 D. 144, indicate without solving the difficulties of the problem. In the English case of *Dow v. Clarke* (3 Add. 79, 5 Russ. 163), Sir John Nicholl and the Court of Delegates successively pronounced against the validity of a will disinheriting the testator's only child, merely because the testator, an eminent electrician, had conceived a strong and groundless aversion to her, which he had manifested by acts of harshness and severity. This comes very near to the principle of

the *Querela inofficiosi testamenti* of the Civil law, as explained in Inst. II. 18.

As to the validity of a will made during a lucid interval, it was remarked by Sir W. Wynn (in *Cartwright v. Cartwright*, 1 Phil. 100), that if "the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it."—See Jarman on Wills, 3d Ed. I. 30.

(d) As to the distinction between insanity and mere facility as grounds of reduction, see *Watson v. Noble's Trs.*, 29 June 1827, 2 W. & S. 648, affirming 4 S. 200; *Scott v. Wilson*, 15 July 1825, 3 Mur. 526; *Whyte v. Ballantyne*, 20 June 1823, 1 S. Ap. Ca. 472; *M'Kellar v. M'Kellar*, *supra*; *Dawson's Trs. v. Maclean's Trs.*, 27 Feb. 1862.

advantage of the party's facility, procured the deed by circumvention (a). Where there was great mental or moral weakness on the part of the testator, persuasion has been held to be tantamount to circumvention (b). The amount of pressure which will constitute circumvention in any given case, is purely a question of fact; and the Court will not readily interfere with the decision of a jury on the point (c). The arts practised by the beneficiary to procure the testator's signature to the deed are seldom discoverable. "But," said the Lord Justice-Clerk Hope, "if the facts satisfy the jury that there was in such party a motive to mislead and induce him to enter into the transaction, either for his own benefit, or for the benefit of some one whose interest he was promoting, and that only persuasion and untrue representations, acting on a mind facile or nervously anxious from disease, on the subject, could have brought about the result, then it is for the jury to say whether they draw from the whole case the inference of circumvention" (d).

Extreme bodily infirmity can only be regarded as a ground of reduction to the extent that it is an element of evidence under an issue of facility and circumvention. The Court look with just suspicion upon settlements obtained by interested parties, or their agents, from testators who, in consequence of illness or old age, are deprived of the full use of the faculties of sight, hearing, or speech (e). However, if proper precautions are taken, and there be no suspicion of undue influence, it seems that the deed even of

Physical incapacity.

(a) See cases of *Watson and Scott*, *supra*; *Baird v. Harvey's Trs.*, 20 D. 1220; *Innes v. Torbet*, 1740, M. 15942; *Home v. Hardy*, 31 Mar. 1842, 4 D. 1184; *M'Diarmid v. M'Diarmid*, 28 Mar. 1828, 3 W. & S. 37, affg. 4 S. 583; *Syme v. Henderson*, 15 July 1835, 13 S. 1132.

(b) *Clunie v. Stirling*, *infra*, 14 Nov. 1854, 17 D. 15; *Watson v. Noble's Trs.*, *supra*.

(c) Compare *Clunie v. Stirling*, and *M'Kellar's case*, *supra*, where motions was refused, with *Dawson's Trs. v. Maclean and Waddell v. Waddell's Trs.*, 12 July 1845, 7 D. 1017, where new trials were granted.

(d) *Clunie v. Stirling*, 17 D. 18.

(e) *Gillespie v. Gillespie*, 11 Feb. 1817, F. C.; *Paterson v. Smith*, 2 Feb. 1809, Hume, 921; *M'Culloch v. M'Crackan*, 3 Dec. 1857, 20 D. 206; *Halliday v. Morison*, 27 June 1857, 19 D. 929. "The maker of a deed," said the Lord Pres. M'Neill, in *M'Kellar v. M'Kellar*, 6 Dec. 1861, 24 D. 144, "may have had capacity when aided, and no capacity without aid; and the withholding of such aid as may be necessary to give the capacity to execute a deed may amount to fraud. . . . For instance, a defender may have prevented a professional person from having access to the person granting the deed, and thus have prevented him having that aid which was necessary

a deaf-mute may be sustained (*a*). It is not a condition of the validity of the will of a blind person that it be read over to him; but the deed may be reduced by proving that he was ignorant of its contents (*b*). If notarial execution is resorted to, attention must be paid to the requisites of that mode of authentication as fixed by decision (*c*).

Presumption
as to Death-
bed.

If the granter of a holograph untested settlement dies insane, there is no presumption that it was executed within the period of insanity; and the holder would seem to be entitled to a verdict on proving that the testator was sane at the time mentioned in the instrument, and supporting that by proper adminicles of evidence (*d*).

Bastards.

At common law, the *testamenti factio* was not withheld from bastards, but they were not allowed to exercise it to the prejudice of the Crown's interest. This disability was removed by 6 & 7 Gul. IV. cap. 22, which, on the grounds of "justice and humanity," enacted that it should thenceforth "be lawful to bastards or natural children, domiciled in Scotland, to dispose of their moveable estates by testament or last will, in like manner as other persons belonging to that country may do."

Aliens

An alien, by the common law of Scotland, cannot be the proprietor of heritable property (*e*); though in England the disability does not extend to lands acquired by purchase (*f*). He cannot,

to give him capacity for understanding it."

(*a*) Menzies, Conv. 40; Jarman on Wills, 3d Ed. I. 129; *Dickinson v. Blissett*, 1 Dicks. 268; *Re Harper*, 6 M. & Gr. 731, 7 Scott, N. R. 431. In *Pet. Kirkpatrick*, the Lord Pres. McNeill observed, that a deaf-mute, capable of communicating by signs, might execute a deed by notaries. "The want of the power of speech," he observed, "does not disable a party from taking the management of his affairs, especially when not combined with the want of power of hearing. And even when it is so accompanied, there are many instances in which persons so afflicted are not merely perfectly capable of managing their own affairs, but who exhibit

proof of the highest intellect. The intellect may be reached by education; and such persons are capable of receiving education" (8 June 1853, 15 D. 736).

(*b*) *Duff v. Earl of Fife*, 17 July 1823, 1 S. Ap. Ca. 498; *Ker v. Hotchkis*, 23 May 1837, 15 S. 983; *Reid v. Baxter*, 19 Feb. 1840, 1 Rob. 66, affg. 16 S. 273.

(*c*) Stat. 1579, cap. 80, amending 1540, cap. 117; Act of Sed. 21 July 1688; *Reid v. Baxter*, *supra*, and cases there cited.

(*d*) *Waddell v. Waddell's Trs.*, 7 D. 605, per Lord Moncreiff.

(*e*) Ersk. 3, 10, 10; *Dundas v. Dundas*, 15 Nov. 1839, 2 D. 31.

(*f*) Lewin, Tr., 4th Ed. 24.

therefore, create a trust of heritable estate, unless he has obtained letters of naturalization, or a certificate under the Act 7 & 8 Vict. cap. 66 (a). As regards the disposal of moveables, his rights are as extensive as those of a subject, with the exception, that they are liable to be suspended during the continuance of a war with his country.

By the English law of treason—extended by the Union to Scotland—all lands, held by whatsoever tenure or title, are forfeited to the Crown on conviction. To avoid forfeiture, many conveyances were at one time executed to confident persons, with the view of creating a trust by anticipation in favour of the granter (b); for of course, after conviction, no trust of heritage would be effectual. The effects of outlawry and civil denunciation are different from that of treason. The denounced rebel or fugitive has no *persona standi in judicio*. His single escheat instantly falls; and if he continues unrelaxed for a year and day, his liferent escheat falls, and the rents and profits of his heritable estate go to the Crown, or other immediate lawful superior (c). The same results follow conviction of a capital crime. But it has never been doubted that denounced rebels retain the fee of their estates; and it is therefore difficult to understand the grounds upon which a minority of the Court, in a modern case (d), disputed the right of such persons to exercise the *jus disponendi*. It is now settled, however, by a solemn decision, that a party under sentence of fugitation may execute a conveyance of heritable property (e). The only restriction on his proprietary right is, that he cannot do any act in prejudice of the superior's liferent interest. Thus it has been held that an heir of entail whose liferent escheat had fallen, could not, by suffering an adjudication to pass, incur an irritancy, so as to pass the estate to the next substitute (f).

Traitors and
Outlaws.

Right of dis-
posal retained
notwithstand-
ing fugitation.

(a) 7 & 8 Vict. cap. 66, § 6.

(b) *Mackenzie v. M'Donald*, 1736, Elch. Tr., No. 4; *Com. of Forfeited Est. v. Mackenzie*, Robertson, 263, 280; *Hamilton v. Hamilton*, 1669, M. 1616.

(c) Ersk. 2, 5, 59, & 66. The consequences of escheat are frequently remitted by the Crown, under the authority of modern statutes, by which the restraints on the alienation of royal

property have been relaxed to the extent of enabling the Crown to restore lands to the family of the former owner, or to give effect to his disposition. See 6 Geo. IV. cap. 17, the latest Act.

(d) *Macrae v. Macrae*, 22 Nov. 1836, 15 S. 54, 1 Rob. 645.

(e) *Macrae's case*. See the learned and exhaustive opinion of Lord Medwyn, 15 S. 64.

(f) Ersk. 2, 5, 67; *Scot v. Scot*,

Bankrupts.

The sequestration of a bankrupt's estate vests all his heritable and moveable estate in the trustee, for behoof of his creditors (a). But the bankrupt has an assignable interest in the reversion capable of being vindicated by action (b), and which may therefore be made the subject of a trust (c).

Insolvents.

Trust deeds granted by insolvents in defraud of creditors are reducible under the provisions of the Act 1621, cap. 18. And by the Act 1696, cap. 5, preferences granted within sixty days of bankruptcy may be set aside as fraudulent (d).

Homologation and Adoption distinguished.

Though a settlement at the time of execution may have been reducible on the ground of incapacity, yet if the granter be *sui juris*, and afterwards accredit the instrument, it will thenceforth be effectual as his deed. On this principle, deeds by minors and married women may be homologated after attaining independence. The term "adoption" which has lately come into use, chiefly in relation to counter issues in reductions on the head of forgery, seems to be properly applicable to acts whereby a party accredits that which was *ab initio* not his deed, but which becomes so by delivery or subsequent acknowledgment of the subscription as his. In such cases, the date of adoption is in law the date of the deed. "Homologation," by which a party waives objections to the formality of the deed (e), or objections going to the fairness of the transaction (*e. g.*, minority and lesion, or facility), seems to give a retrospective validity to the instrument from its date. "When," says Prof. Bell (f), "the original party homologates, he either *ratifies* a deed or obli-

1722, M. 3673. In *Coombs v. the Queen's Proctor*, 2 Roberts, 547, Sir John Dodson decided, that where the wife of a felon, under sentence of transportation for a term of years, died *intestate*, leaving property acquired by herself subsequent to his conviction, such property belonged, not to her next of kin, but to the Crown. However, it has been decided in other English cases (*Re Martin*, 2 Roberts, 405, 15 Jur. 686; *Atlee v. Hook*, 23 L. J. Ch. Ca. 776), that the wife of a transported felon has the *testamenti factio* as to her separate acquisitions; an equitable exception which may perhaps be extended to married women in

Scotland, on the analogy of the cases of *Churnside v. Currie*, 11 July 1789, M. 6082, and *Orme v. Diffors*, 30 Nov. 1833, 12 S. 149. But see *contra*, *Dick v. Donald*, 12 Dec. 1826, 2 W. & S. 522.

(a) 19 & 20 Vict. cap. 79, § 102.

(b) § 155; and see Bell, Com. 1236 (5th Ed. II. 434), and cases there cited.

(c) Comp. Lewin, Tr., 4th Ed. 25.

(d) See Chap. XIX. (Trusts for Creditors).

(e) As to the adoption of informal writings, see Chapter IV. Sec. II.

(f) Bell, Com. 5th Ed. I. 145; Ersk. 3, 3, 47.

gation already executed but imperfectly; or he *adopts* and gives effect to what would otherwise be null. When there is already an obligation existing, though imperfect or subject to exception, homologation may have the effect of confirming it as good from the first; where the deed or obligation is null, homologation acts only as the adoption of what is reduced to an intelligible and precise shape, but is in no degree binding; and the binding effect has in this case no retrospect."

In the case of *Gall v. Bird* (a), where a contract of dissolution of partnership and trust assignation was brought under reduction, on the grounds of mental incapacity, and also of facility and circumvention, the Second Division, after mature consideration, allowed an issue of homologation counter to the issue of facility; but refused to allow the same issue to be taken counter to the general issue on the deed; being of opinion, that if insanity were proved, the deed could only be set up by a substantive action of declarator (b). It is difficult to reconcile this view with the now settled practice of trying issues of adoption in replication to the defence of forgery.

Questions of homologation in Reductions on the ground of Insanity and Facility.

It is scarcely necessary to remark, that a will reducible on the ground of incapacity, if capable of being accredited at all, could only be set up upon pregnant evidence of adoption, after the granter became possessed of the requisite degree of capacity. Until a precedent is made, we can only say, guided by analogy, that we see no reason why the delivery of a void testamentary settlement, or its adoption in a *subsequent writing*—after the settlor has acquired the *testamenti factio*—should not be as effectual to remove intrinsic objections as these acts admittedly are, to obviate objections to the formality of the instrument (c).

A settlement may also be homologated by one who has an adverse interest; in which case, his right of challenge upon any

Homologation by beneficiaries.

(a) *Gall v. Bird*, 3 July 1855, 17 D. 1029.

(b) Erskine lays down that deeds executed by a pupil or insane person are incapable of being homologated; but it would seem they may be adopted. The *labe*s cannot be of a more radical character in the cases put by the learned author than in the case of forgery. See the passage III. 3, 47.

(c) It would seem that a will made in England during the subsistence of a personal disability, may be validated by *republication* after the testator is *sui juris* (Jarman on Wills, 3d Ed., I. 36); that is, by either renewing the solemnities of authentication, or adopting the will by reference in some subsequent writing (Ibid. I. 178).

ground of which he was aware at the time of homologation is for ever cut off (a). But there is no room for the application of the doctrine if the homologating party were ignorant of the objection (b).

SECTION II.

OF THE TRUSTEE.

It may be affirmed as a general principle, that the law of Scotland imposes no restriction on the right of any class of persons to execute trust purposes (c), excepting such as may arise from the incapacity of the party to perform the duties pertaining to his office. As to the form in which the appointment may be made, we refer to the subsequent chapter, on the Appointment of Trustees, where the cases are commented on (d); merely premising that no particular form is necessary; and that an appointment by descriptive reference is equally effectual with a nomination (e).

The Crown.

The Crown may assume the functions of a trustee; and, by the common law of the United Kingdom, the Sovereign has but a fiduciary right to those subjects classed as *res publicæ*; comprehending such subjects as seas and shores, rivers and harbours, roads and bridges, fairs and markets, etc. The actual management and administration of public property of this description, devolves in most instances upon local trustees, except in the case of the sea and sea-shore, the use of which is subject to the control of the Board of Admiralty. In all such cases, the proprietary right of the Crown partakes more or less of the nature of a trust for the use of the public. Accordingly, in *Colquhoun v. Paton*, the judges were unanimously of opinion that the Board of Admiralty had no power

(a) As to homologation of settlements by interested parties, see *M'Michan v. M'Michan's Trs.*, 22 June 1839, 1 D. 1085; *Murray v. Murray*, 21 Jan. 1826, 4 S. 374; *Leiper v. Cochrane*, 9 July 1822, 1 S. 552; *Ewen v. Hutcheon*, 17 Nov. 1830, 4 W. & S. 346, revg. 6 S. 479; *Kyle v. Allan*, 23 Feb. 1832, 11 S.

87; *Fraser v. Fraser*, 7 Nov. 1834, 13 S. 703.

(b) *Erskine*, 3, 3, 48; Bell's Pr. § 27.

(c) A beneficiary may of course be a trustee. Were the rule otherwise, it would in many cases be difficult to procure an accepting quorum.

(d) Chapter XIV. Sec. I.

(e) Bell's Com., 5th Ed. I. 32.

to authorize the erection of a pier extending across the sea-shore, except under the reservation of a right in the public to make use of the pier upon payment of reasonable charges (a). The Crown's interest in the salmon fishings of the British seas is not that of a trustee; the House of Lords, affirming the decision of the whole Court, having decided that the right in question forms part of the hereditary revenues of the Crown (b). A minority, however, were of opinion that it was merely a fiduciary interest, and that the public were entitled to the beneficial enjoyment of the fishings, free of charge.

The Crown may also fulfil the duties of a private trustee, if nominated to the office. This is assumed in the English authorities; and there is no principle of Scotch law tending to exclude the title of the Crown as a fiduciary (c). For example, if a testator endow a college or a university chair, and vest the right of appointing professors in the Crown, that would obviously be a valid and operative trust; but of course the Crown, like any other trustee, might think proper to decline accepting the patronage. In England, it has been doubted whether the Crown can be compelled to execute the trust purposes after having accepted the office and estate; and the weight of authority seems to incline towards the negative side of the question. The English decisions upon this point—which cannot in its results be considered as of any practical consequence—are founded on a purely technical view of the nature of the Chancery jurisdiction, which is said to be an authority delegated by the Sovereign to the Chancellor, to restrain the too rigid operation of the rules of common law in cases betwixt subject and subject (d). Such authority being, it is argued, an indirect exercise of the King's prerogative, it cannot legally be exercised where the interests of the Crown are at stake. Such considerations are inapplicable to the administration of justice in the Court of Session, a tribunal deriving its equitable as well as its legal jurisdiction from the authority of Parliament. We see no reason, therefore, to doubt that the Court of Session would be found to have an adequate jurisdiction to determine the rights of parties under any trust in

May the Crown be trustee of an endowment.

(a) *Colquhoun v. Paton*, 15 Dec. 1853, 10 D. 206. D. 854. See *Lord Adv. v. Clyde Trs.*, 12 May 1852, 24 Jur. 110.

(b) *Comrs. of Woods v. Gammell*, 28 Mar. 1859, 3 Macq. 419, affg. 13 (c) See *M'Kenzie v. M'Donald*, 1736, Elch. "Trust," No. 4.

(d) *Lewin Tr.*, 4th Ed. 26.

which the Crown might have an interest, whether as trustee or otherwise. Mr Lewin (*a*) has suggested that an application to the Sovereign by petition would be an appropriate remedy open to the suitor; in which case, he says, it cannot be supposed that the fountain of justice would not do justice.

Bodies Corporate.

Corporations may act as trustees both in England and Scotland. In the case of charitable trusts, and institutions for which it is desired to establish a perpetual endowment, it has been usual to vest the management of the trust property in municipal bodies or local corporations interested in the prosperity of the district (*b*). The object is sometimes sought to be attained by imposing on certain public bodies the duty of nominating one or more of their number to be trustees in perpetuity. Where the testator has failed to nominate trustees for the execution of a charitable bequest, the magistrates of the town to which the bequest was left, are entitled to bring an action to have the trust purposes declared (*c*), and a scheme of management approved of by the Court (*d*). On similar principles, it has been held that the Sheriff and Sheriff-clerk of a county town were entitled to bring an action to compel the administration of a charitable bequest, which was entrusted in general terms to the care of "the two highest civil officers of the town (*e*). It is not easy to define the nature and extent of the fiduciary relation which devolves upon local authorities in cases of this nature. But if on principle they are bound to see to the right appropriation of the trust funds in the outset, it seems reasonable also to conclude that they have an interest at common law to see to the administration of the trust estate as long as its purposes remain unfulfilled (*f*).

Incorporated Companies.

The common law capacity of a corporation to sustain the fiduciary character, does not extend to trading corporations. This doctrine is expressly recognised in the case of the Bank of Eng-

(*a*) Lewin Tr., 4th Ed. 27.

(*b*) *Trades of Edin. v. Gvs. of Heriot's Hospital*, 3 June 1836, 14 S. 873; *Mag. of Inverness v. M'Intosh*, 4 Mar. 1824, 2 S. 769; *Murdoch v. Mag. and Min. of Glasgow*, 30 Nov. 1827, 6 S. 186; *Gordon's Hospital v. Min. of Aberdeen*, 8 July 1831, 9 S. 909; *Gardner v. Trinity H. of Leith*, 23 Jan. 1845, 7 D. 286.

(*c*) See *Shepherd & Grant v. Connel*, 17 D. 516; *Blackwood v. Milne*, cited in 17 D. 519.

(*d*) *Mags. of Dundee v. Lindsay & Morris*, 3 M'Q, 155; Sequel, 23 D. 439.

(*e*) *Boe v. Anderson*, 11 Nov. 1857, 20 D. 11. Sequel, 7 Mar. 1862.

(*f*) See Chapter XX. (Charitable Trusts); and *infra*, p. 94.

land (a), and may be extended to other companies incorporated or otherwise privileged by Act of Parliament, on the authority of the principles laid down by Lord Cranworth, in the case of the *Caledonian and Dumbartonshire Ry. Co. v. Magistrates of Helensburgh*. The point decided was, that an agreement to apply the money of a company to a purpose not contemplated by the local statutes was void, and could not be enforced against the company; the principle being that joint stock companies exist only for the purposes declared in the act of incorporation, and have no power to bind themselves to the performance of extraneous duties, or to subject themselves to pecuniary liability in consequence (b). The reasoning on which this judgment was founded, is equally applicable to the case of incorporated banks; and we may fairly infer from it that no joint stock company would be warranted in assuming, directly or indirectly, the responsibilities of trustees.

A married woman may be a trustee, and may take part in the active duties of the office (c). But we may be permitted to question the expediency of such a selection. The observation of Lord Meadowbank in *Stoddart's* case, that there is "no sinking of the rational person by marriage," must not be understood as an answer to all the objections to such an arrangement. The denial of personal standing, it may be argued, extends no further than to nullify her separate acts where the husband's interests are concerned. Her obligations are null, because their fulfilment could not be enforced by diligence without depriving the husband of her society, or attaching her property, in which the *jus mariti* gives him an interest. But if his interest is excluded, as by absence from the country amounting to desertion, her person revives; and in like manner, if his marital rights are excluded with respect to a particular estate, her transactions with reference to that estate receive effect, although the husband's consent be withheld.

Does marriage
create a dis-
ability?

On the other hand, it may be affirmed that, wherever a legal

Whether the
Husband is
responsible?

(a) *Lewin, Tr.*, 4th Ed. 27. Formerly the Bank was obliged to enter extracts from wills in its books; but now, by 8 & 9 Vict. cap. 97, the executors or administrators are entitled to transfer stock, on producing extract probate, or letters of administration.

Railway v. Mags. of Helensburgh, 19 June 1856, 2 Macq. 391.

(c) *Stoddart v. Rutherford*, 30 June 1812, 16 F. C. 716; *Darling v. Watson*, 14 Jan. 1824, 2 S. 607, affirmed, 11 May 1825, 1 W. & S. 188; *Laird v. Milne*, 16 Nov. 1833, 12 S. 54; *Lewin, Tr.*, 4th Ed. 28; *Forsyth, Tr.* 93.

(b) *Caledonian & Dumbartonshire*

responsibility is incurred to third parties as a consequence even of the lawful acts of the wife, the husband is the responsible party,—his protection being that the acts in question are null unless consented to by himself. Hence arises a difficulty in determining the limits of a married lady's authority as trustee, upon principles consistent with justice to the husband, and due responsibility for the execution of the trust. For example, it has been argued that a married lady cannot sue in the capacity of trustee without the formal consent of her husband (a); but it is not said that he is to be responsible for withholding his consent when the interests of the trust require that it should be given. It does not seem consistent with the intentions of a truster that any constraint should be laid on the discretion of his trustees, by a person who is not bound by the trust, and whose interest in interfering extends no further than to keep himself clear of pecuniary liability. It seems unfair, on the other hand, and opposed to legal principle, to hold the husband liable for the expenses of litigation or other contract debts incurred by his wife as trustee, if her administration of the trust is binding irrespective of his consent. A difficulty might also occur in the event of a married lady being obliged to join in executing a conveyance, where she was nominated a sole trustee, or *sine qua non*, as happened in *Stoddart's* case (b). Assuming that the trust deed conferred upon her the power of acting independently, she may convey the estate to the wrong party, or at the wrong time—*e. g.*, while the trust purposes are unfulfilled; is the husband to suffer for her breach of trust? The hardship is equally great, whether the loss is borne by the beneficiaries or by the non-consenting husband.

Husband may
refuse consent
to his wife's
acceptance.

It has been held that a man is entitled to prohibit his wife *in limine* from accepting the office of trustee (c). In the case of her having been appointed when single, it has not been decided that he is entitled to insist upon her retirement from the office; but the import of the case just cited, and of the English case of *Lake* (d), is favourable to such a view of the husband's rights (e).

(a) *Laird v. Milne*, *supra*, per Lord Glenlee.

(b) *Stoddart v. Rutherford*, *supra*.

(c) *Ibid*.

(d) *Lake v. De Lambert*, 4 Ves. 595, per Lord Loughborough.

(e) "The nomination of a woman as trustee," says Bell (Com. I. 32), "seems to fall with her marriage; but where the appointment is made before marriage, and the truster survives that event, and is aware of it, without alter-

A pupil is obviously incapable of being a trustee. No person Pupilarity. can be constituted a trustee until he has accepted the office; and that acceptance a pupil, equally with an insane person or idiot, is understood to be incapable of granting. The doctrine has been recognised in the case of a pupil professing to enter into a partnership—a relation which is constituted by consent, and implies capacity (a); and the same reasoning would forbid his entering on the management of a trust.

The same objection cannot be maintained against the appointment of a minor. Minority. Such an appointment is objectionable, however, on grounds already discussed as applicable to the appointment of married women; *i. e.*, because he is subject to the control and interference of guardians, and is therefore not free to exercise his own discretion. It may be thought by some that the case would never occur, as people would naturally be unwilling to commit the management of their property to such persons as are too young to have full power over their own. It is easy, however, to figure cases of practical occurrence. Thus a trust constituting a widow trustee on the estate of her husband, might emerge by his decease before she had attained majority. Or a minor might enter into partnership—a matter of everyday occurrence—in which case it might be deemed expedient to vest the business premises or other heritable property in the partners, including the minor, as trustees for the firm. In either of these cases the appointment might be assumed to be unobjectionable, if legally competent. Reverting therefore to the question of competency, it would seem that there are no technical obstacles to a minor's assumption of the office or execution of the trust, since the only acts which he is legally debarred from performing—*e. g.*, gratuitous alienation or discharge, and *mortis causa* disposition—are equally incompatible with the functions of a trustee. If, therefore, the appointment is incompetent, it must be on the simple ground that a minor is considered *not to possess the requisite discretion*. Now, it is true a minor cannot be trustee on a sequestrated estate (b); nor can he be appointed a judicial factor; and he is

ing the nomination, he is held to continue it intentionally."

(a) *Macaulay v. Renny*, 15 Feb.

1803, Bell's Com. 210 (5th Ed., II. 624).

(b) *Pet. Threshie*, 30 May 1815, F. C.

disqualified at common law from voting at elections. On the other hand, a minor may execute faculties under an entail, or consent to a disentail in certain cases; he may sell, lease, or burden his property; and he may even present to a living, whether he have or have not curators (*a*)—a fiduciary power requiring for its exercise a certain degree of discretion; and it has been held that a minor may be decerned executor-dative, and as such may give a valid discharge with consent of curators (*b*). We incline therefore to the opinion, notwithstanding some dicta to a contrary effect (*c*), that a minor must be presumed to have discretion for this office. This appears also to be the view generally taken in England, where our distinction between minority and pupillarity is unknown (*d*). In the case of an heir-at-law who is trustee for the purpose of making up titles and conveying to his ancestor's general disponees, there can be no doubt that a minor would be entitled to perform this merely formal duty, as no deed which a minor can be compelled to grant is challengeable (*e*). In practice, where minors are appointed trustees of a settlement, their power of acting is declared to be suspended until the attainment of majority.

Liability of
Minor Trustee.

In the event of a minor trustee being induced to join, in that character, in deeds prejudicial to his interests, the trustees might be subjected to the inconvenience of having to defend their administration in a reduction on the grounds of minority and lesion. The liability to such proceedings is perhaps a sufficient reason why trustees should hesitate to enter on the management of property in conjunction with a minor trustee. From the inconveniences attending the appointment of a minor as trustee, there arises a strong presumption that property given to a minor is intended to be taken beneficially (*f*).

Alienage.

Aliens may be, and not infrequently are, appointed trustees; but it must be remembered that a disposition of heritage to an alien is void. Such persons, accordingly, are disqualified from acting as trustees for the administration or distribution of heritable property.

(*a*) *Brown v. Johnstone*, 9 June 1830, 8 S. 899.

(*b*) *Johnston v. Lowden*, 15 Feb. 1838, 16 S. 541.

(*c*) *Pet. Wylie*, 28 June 1850, 12 D. 1110; *Shank v. Aitken*, 8 S. 639.

(*d*) *Lewin Tr.*, 4th Ed. 29.

(*e*) *Graham v. Earl of March*, 31 Jan. 1735, M. 16339.

(*f*) *Lewin, Tr.*, 4th Ed. 31, and cases there cited.

An alien enemy is incapable of accepting a trust, as, by the law of nations, he has no *persona standi in judicio*.

Mr Forsyth (a), on the authority of an old case (b), says, that a conviction for high treason forms the sole recognised disqualification on the score of crime. It must be added, however, that there is no authority for holding that convictions for other infamous crimes do *not* disqualify. A sentence of outlawry must of necessity operate as a bar to the acceptance of a trust; and it is but reasonable to presume that the acceptance of a trust by a party undergoing punishment for crime would be void. The question, however, is of no practical importance; because any circumstance raising suspicions of dishonesty, or of inability to discharge the duties incumbent on a trustee, may be made the ground of an application to the Court for his removal from the office. This subject, however, will fall to be considered in a subsequent Chapter.

Crime and Outlawry.

It has usually been considered that a sole trustee is the most eligible appointment for the settlement of an insolvency or bankruptcy (c). The objects of the trust, which are the immediate recovery of assets and the distribution of the proceeds, cannot be so well accomplished where the administration is impeded by divided counsels; and despatch is of more consequence to the creditors than the most perfect security. But where a continuing management is contemplated, as in family settlements and trusts for the management of property, it is desirable to unite the discretion and trust-worthy qualities of several trustees (d). To guard against possible danger to the estate (which may happen, without wilful dishonesty, in the event of a sole trustee being overtaken by a sudden reverse of fortune), provision should be made for keeping the trust full by assumption. As to the proper number of trustees, where more than one is requisite, the old formula, *Tres faciunt collegium*, furnishes a safe rule for a minimum; and the trust may be kept full by means of a clause prohibiting any smaller number from acting until he or

Selection of a proper number of Trustees.

(a) Forsyth, Tr. 93.

(b) *Mackenzie v. M'Donald*, 1786, Elch. Tr., No. 4. Where a testator devised real estate to his wife and an alien upon trust to sell, and the alien trustee afterwards obtained an act of naturalization, it was held that the act

did not operate retrospectively so as to validate the title of a purchaser of the trust estate (*Fish v. Klein*, 2 Mer. 431).

(c) Bell's Pr. § 1993, 1.

(d) Bell's Pr. § 1993, 2; Lewin, Tr., 4th Ed., Chap. III. Sec. 2.

they shall have taken the necessary steps for restoring the trust to the standard of numerical efficiency.

SECTION III.

OF THE BENEFICIARY.

The right acquired by the beneficiary is a *jus ad rem*, which he may enforce by action against the trustee. And as the capacity for acquiring cannot be less extensive in the case of a personal right than in the case of a right of property, it follows that those who are capable of taking the estate by direct conveyance may also acquire an interest in it through the intervention of a trust; and this interest, with all its incidents, they may lawfully assign to a purchaser (*a*).

Estate of the
Crown.

The Sovereign may acquire property beneficially through a trustee, either in consequence of the grantor's declared intention, or as *ultimus hæres* upon failure of the trust purposes (*b*). In England it appears that the title of the Crown, whether legal or beneficial, can only be constituted by conveyance of record (*c*). We are not aware that the law of Scotland interposes any obstacle to the beneficial acquisition of property by the Crown under an ordinary conveyance. It is understood that the Crown cannot complete a title to feudal property as disponee under a conveyance from a subject, as it is inconsistent with the position of the Sovereign as lord paramount that he should hold lands feudally from his vassal (*d*). But it has never been doubted that the Crown may take a personal right to feudal subjects, and convey it to a donatory; and it is obvious that lands which the Sovereign acquires by succession or purchase, as private property, may be held beneficially, if the feudal title is vested in trustees. The analogous case of partnership interests in land, proves, or at least illustrates, our proposition (*e*). When the Sovereign as *ultimus hæres* claims a trust estate in con-

(*a*) *Robertson v. Pattinson*, 13 Aug. 1846, 5 Bell, 259; affirming 6 D. 944.

(*b*) *Finnie v. Lords Comm. of Treas.*, 30 Nov. 1836, 15 S. 165.

(*c*) Lewin, Tr., 4th Ed. 34.

(*d*) Ersk. 2, 3, 44. Bank., 2, 4, 4.

(*e*) *Torrie v. Munsie and King's Remembrancer*, 31 May 1832, 10 S. 597; but see *Finnie v. Comm. of Treasury*, 30 Nov. 1836, 15 S. 165.

sequence of the failure of purposes, the action may be directed against the trustees by the Lord Advocate as his representative, under the Crown Suits Act, 1857 (*a*).

An alien may of course take a beneficial interest in moveable property (*b*); and, under the 5th section of the recent Alien Act, he may hold an interest in lands and houses, for the purpose of residence or business, for any term not exceeding twenty-one years. It has never been decided that an alien is incapable of acquiring a beneficial interest in the produce of land estate in Scotland, under a trust directing trustees to hold such lands for his benefit. The common law of Scotland is more jealous of entrusting heritable property to the custody of aliens than that of England. The exclusion of such persons has reference not only to succession, but to purchases (*c*); the reason assigned for the exclusion being, that an alien who owes allegiance to another sovereign is not in a position to perform his feudal service faithfully to the superior (*d*). Now in England, where an alien is disqualified from acquiring real estate either by descent or by operation of law, it has been held that a trust of lands for his benefit, although not absolutely void, is incapable of being enforced by the beneficiary in a question with the Crown (*e*).

Can Alien take
an interest in
Real Estate?

There can be little doubt that an alien would be held entitled to take a bequest of the proceeds of heritage in Scotland, if the trust were coupled with a direction to sell (*f*), as this would have

Proceeds of
Real Estate
directed to be
sold.

(*a*) 20 & 21 Vict. c. 44; *Lord Adv. v. Royal Infirmary of Edinr.*, 28 June 1861, 23 D. 1213.

(*b*) 7 & 8 Vict. c. 66, § 4; but see as to legal succession, *Ersk. infra*.

(*c*) *Ersk.* 3, 10, 10.

(*d*) *Ersk. supra*.

(*e*) *Lewin, Tr.*, 4th Ed. 35; *Jarman on Wills*, 3d Ed. I. 59, 61. The point was decided in *Barrow v. Wadkin*, 24 Beav. 1, 27, L. J. Ch. Ca. 129, in favour of the Crown. On a full review of all the previous cases, Sir J. Romilly came to the conclusion, that "on principle and authority, a devise of real estate to trustees for an alien is not a void devise; that it is a trust of which the Crown may enforce the execution, and

of which it may obtain the benefit."

"I have also thought it better," he continued, "not to dwell on the argument relating to the policy of the law which is the foundation of the rule prohibiting aliens from holding lands in this country, which is much noticed and relied on in certain cases. So far, however, as this has any application, it supports the principle of the view I have taken."—(27 L. J. Ch. Ca. 138.)

(*f*) In *Du Hourmelin v. Sheldon, Ltd.* Cottenham, C., affirming the decision of Lord Langdale, M. R. (1 Beav. 79, 8 L. J. Ch. Ca. 133), decided that an alien beneficiary was entitled to an interest in the proceeds of lands devised

the effect of converting the estate into a moveable succession (a). The privileges accorded to naturalized subjects and aliens holding certificates under the Act 7 & 8 Vict. c. 66, will of course extend to the beneficial interest as well as the feudal title in heritable estates (b).

Trusts for
Mercantile
Companies.

Although an ordinary trading company or other unincorporated society cannot sustain the character of feudal proprietor, the disability may be avoided by taking the title in the name of the partners as trustees for the company; and the society will in this case have the same right of action against the trustees as any other beneficiary. It would seem also that a committee of management representing a society, or a larger number of persons mutually interested in property or associated for a lawful purpose, may to certain effects be admitted to sue on their behalf (c). The provisions of the Trustee Act of 1861 (d) do not apply to the appointment of trustees under the contract of any trading company.

Titles to Pro-
perty held in
Trust for Cor-
poration.

It seems that in England a corporation cannot take a beneficial interest in lands without license from the Crown (e); but this rule has never been sanctioned in Scotland. The cases of *Campbell v.*

to trustees, upon trust to sell. Lord Cottenham observed,—“If the Crown is entitled in this case, it must be entitled to all monies left to aliens, if raised out of land; and if so, it would operate against the legacies of alien legatees directed to be raised out of land; nor could any debtor or other person direct his land to be sold for payment of his debts if any of his creditors happened to be foreigners; nor could any foreigner enforce his claim against his English debtor if the latter had no other property than real estate.”—(4 My. and Cr. 525, 9 L. J. Ch. Ca. 25.) See also *Master v. De Croismare*, 11 Beav. 184, 17 L. J. Ch. Ca. 466.

(a) *Speirs v. Speirs*, 21 Nov. 1850, 10 D. 83; *Gardner v. Ogilvie*, 25 Nov. 1857, 20 D. 107; *Adv.-Gen. v. Blackburn*, 27 Nov. 1847, 10 D. 167; and see the other cases collected in Chap. XXI. Section III. (Powers of Trustees).

(b) If an estate is left to an alien and a subject jointly, and no claim is preferred by the Crown during the joint lives, it would seem, according to the views entertained by English lawyers, that on the death of the alien the co-proprietor succeeds *jure accrescendi* to the alien's share, subject to the Crown's claim; but that if the alien survive, he does not succeed to the co-proprietor's share, either for his own behoof or for the Crown, because the law, by its own act, does not give the estate to one whom it does not permit to retain it.—(Jarman on Wills, 8d Ed. I. 60, and cases there cited.)

(c) *Fife and Kinross Railway Co. v. Deas*, 4 Jan. 1859, 21 D. 187. But see *M'Millan v. Free Church Assembly*, 1862; and cases on Church Property, collected at the end of Chap. XX. (Charitable Trusts).

(d) 24 & 25 Vict. cap. 84, § 3.

(e) *Lewin, Tr.*, 4th Ed. 34.

The Orphan Hospital and Gardner v. The Trinity House of Leith (a) decided, that where a corporation was invested with the administration of lands in trust, it was entitled to hold them in the name of its office-bearers as constituting the corporation; but it was assumed by the Lord Ordinary (b), in the case of *Gardner*, that the title might have been separated from the beneficial interest. "If," he said, "in strict feudal form, there should chance to be a flaw in the defender's investiture—viewing that investiture as one in favour of the corporation—this can never touch the radical right to the estate, which unquestionably belongs to the defenders as a body." In *Campbell's* case, the Lord Justice-Clerk Hope observed, "I cannot hold that it is a corporation which has here been entered; for I think it is clear, that if a society have a corporate style given to it, it cannot be correctly vested with property except by that technical name; nor does a grant to the officer of a corporation make that corporation a vassal of the superior" (c). But his Lordship and the other judges held, that as the superior had agreed to enter the corporation, he was not entitled to demand composition for entering their treasurer. In fact, as a superior is not bound to enter a corporation (d), it is necessary, if he refuse, to take the title in name of a trustee; and to this extent Lord Stair considered that a trust might be constituted in favour of a corporate body (e).

By means of a trust conveyance, an interest in property may be conferred on an indefinite number of persons; as, for example, in a trust for the poor of a parish, or for the education of children in a particular locality. Where a beneficial interest is vested in this way in a class of persons, simply as objects of charity, and apart from any special qualification, it has been held that any person answering to the description of persons described in the grant has a right to sue for enforcement of the trust; and accordingly an action of declarator was sustained with reference to the administration of a bequest to the poor, where the pursuers described themselves as belonging to a class of operatives in the parish liable to be thrown

Trusts for an indefinite class of Persons.

(a) *Campbell v. Orphan Hosp.*, 28 June 1843, 5 D. 1277; *Gardner v. Trinity House of Leith*, 23 Jan. 1845, 7 D. 286.

(b) Lord Ivory. See 7 D. 293.

(c) 5 D. 1277.

(d) *Hill v. Merchant Co. of Edinr.*, 17 Jan. 1815, F. C., overruling previous cases.

(e) Stair, 2, 3, 41.

out of employment, and as such having an interest in the due management and administration of the bequest (a). But where a discretionary power of selection is conferred upon trustees, as in the case of a trust for presentation to a bursary, an unsuccessful candidate for the appointment has no title to challenge the election of another person, on the allegation that he was disqualified; for he has no vested interest in the charity until his own qualification has been declared by a vote of the trustees (b).

Bequests to
Instrumentary
Witnesses;

to Trustees.

In the cases of *Ingram v. Steinson* (c) and *Grahame v. Marq. of Montrose* (d)—which established the principle that a settlement is not void because witnessed by one of the legatees—the question was raised without having been decided, whether the witness could claim the bequest in his own favour. In practice, the question is avoided by selecting disinterested parties as instrumentary witnesses. We refer to the chapter on Acceptance for a discussion of the question, how a trustee may also take benefit as a legatee (e).

(a) *Liddle v. Kirk-Sess. of Bathgate*, 14 July 1854, 16 D. 1075.

(b) *Ramsay v. Un. Col. of St Andrews*, 28 June 1860, 22 D. 1328, affd. 4 June 1861, 23 D. (Ap. Ca.) 8.

(c) *Ingram v. Steinson*, 1801, M. Ap. Writ, No. 2.

(d) *Grahame v. Marq. of Montrose*, 1685, M. 16887. In England, the consequences of the opposite rule (that a deed witnessed by an interested party was void) were found to be so indefensible, that the Legislature interposed,

first by 25 Geo. II. cap. 6, and afterwards by 1 Vict. cap. 26, § 14, 15; and provided in substance that the will should stand, but that the bequest should be void. However, a creditor witnessing a trust for payment of debts does not forfeit his claim; nor is an executor disqualified from acting as such by reason of his being an instrumentary witness (§ 16 and 17).

(e) Chapter XIII. (Acceptance and Disclaimer).

CHAPTER VI.

OF TRUST PURPOSES.

TRUSTS have been divided, according to their purposes, into Lawful and Unlawful; but this distinction is of too indefinite a nature to afford a satisfactory basis of classification. In the present chapter, we shall, however, for convenience of reference, consider—(1) those purposes which, though lawful, are peculiar or exceptional in their nature; (2) purposes, the full execution of which is to a certain extent restrained by positive law, or considerations of public policy; (3) trusts for accumulation, which on account of the importance of the subject, may be dealt with in a separate section.

SECTION I.

OF LAWFUL PURPOSES.

Unless the object proposed by the truster is prohibited by statute, or is inimical to the principles or policy of the law of Scotland, the mere circumstance that the same end cannot be accomplished by a direct conveyance will not prevent it from being carried into effect through the medium of a trust. The inconvenience which would arise from subjecting property held in fee-simple to all the forms of condition and restraint which might be imposed by the caprice of former proprietors, has led to the recognition of the general principle (subject to a few well-known exceptions), that qualifications upon a fee-simple estate are only binding on the immediate donee. To a certain extent, however, such qualifications may be rendered effectual by vesting the property in trustees, to be held by them for such time as may be necessary for carrying out the object

Trust not unlawful because same object unattainable by direct Conveyance.

of the settlor, which, as a general rule, will be executed according to his intention, if not inconsistent with law (a).

Succession of
Estates in Fee-
simple.

In conveyances of land, a succession of estates in fee-simple is inadmissible, except under the forms and conditions of the Entail Act, 1685, cap. 22 (b). At common law, indeed, a destination to substitutes, with prohibitory clauses, was binding *inter hæredes* (c), and was enforced by the Court until the principle was altered by the Act of 11 & 12 Victoria (d); but destinations with prohibitory clauses, and imperfect entails, are now placed on the same footing as simple substitutions. They give the law of the succession so long as they are allowed to stand unaltered; but are liable to be defeated by the institute or the substitutes, any of whom is entitled to alter the destination at pleasure, even when not feudally vested in the subject (e). The law of Scotland looks also with disfavour on future or contingent fees; insomuch that even a conveyance in liferent, with a fee to the children *nascituri* of the grantee, was held to vest the fee-simple estate in the liferenter (f); though, as we shall see, the rule was held to be obviated by the addition of the words, "for life-rent use allenarly,"—those words being held to raise a trust in the person of the liferenter for behoof of the children. Perpetuities by way of liferent are now prohibited by the Entail Amendment Act, which enacts (g) that "it shall be competent to grant an estate in Scotland, limited to a liferent interest, in favour only of a party in life at the date of such grant."

Statutory re-
straint upon
Liferents and
Fiduciary In-
terests.

While life interests in land can only be created in favour of persons *in esse*, the fee may be given to persons described in the deed, although non-existent at its date. At common law, it would seem that liferent interests limited to several successive generations might be made effectual as real burdens (h), and that even a perpetual succession might be limited by means of a trust (i). By the

(a) *Ramsay v. Ramsay*, 23 Nov. 1838, 1 D. 89, per Lord Fullerton.

(b) 1685, cap. 22.

(c) *Cathcart v. Cathcart*, 18 July 1831, 5 W. & S. 315.

(d) 11 & 12 Vict. cap. 36, § 43.

(e) *Gordon's Trs. v. Harper*, 4 Dec. 1821, 1 S. 185; *Paul v. Boyd's Trs.*, 22 May 1835, 13 S. 818; *Smith v. Murray*, 9 Dec. 1814, F. C.

(f) See this subject treated in Chapter VII. (Construction).

(g) 11 & 12 Vict. cap. 36, § 48.

(h) *Erskine v. Wright*, 1 Mar. 1843, 8 D. 863.

(i) *Strathmore v. Strathmore's Trs.*, 23 Mar. 1831, 5 W. & S. 170, and cases there cited; *Cairnie v. Cairnie's Trs.*, 14 Nov. 1837, 16 S. 1.

Entail Amendment Act, trusts as well as liferents are put on the same footing as entails with respect to duration (a); and therefore any trust purpose in the nature of a substitution, extending beyond the period limited, is defeasible by the beneficiary.

Substitutions in moveables, when constituted by direct conveyance, are not binding *inter hæredes*; the interposition of a trust being necessary to preserve the contingent fee. According to Erskine, "a substitute in a bond has, in the common case, no stronger right than the substitute in a simple destination of a land estate; for the institute can, in the character of absolute fiar, evacuate the substitution by a deed merely gratuitous" (b). It was assumed in several of the earlier cases, that substitutions in settlements of moveables were effectual in a question with the executors of the institute (c): but it is now settled, first, that there is a presumption in favour of conditional institution in destinations of moveable property; secondly, that even where substitution may be clearly implied from the terms of the destination, the substitute has no right, but merely a *spes successionis* (d). The law was thus stated by Lord Wynford, in a case heard before himself and Lord Brougham, and in which the judgment of the Court of Session was affirmed. Referring to the case of *Brown v. Coventry*, his Lordship said, "The principles upon which that case was decided are very clearly and distinctly stated. The distinction was made between real and personal property. Real property is governed by the feudal law and custom of Scotland; personal property in Scotland is governed by a different law, viz., by the Roman law . . . If it was real property, you are to presume that it was the intention of the party to grant what is called a substitution; if personal property, it is presumed to be the intention of the party to give an immediate and complete interest in it at once" (e).

Substitutions
in Moveables.

McDowall v. McGill exemplifies in a simple form the well-known

Substitutions
defeasible by
changing the
Securities.

(a) 11 & 12 Vict. cap. 36, § 47.

(b) Ersk. 8, 8, 44.

(c) *Campbell v. Campbell*, 1740, M. 14855; *Robertson v. Kerr*, 1742, M. 8202; *Smith v. Grieve*, 1801, M. "Subst. and Cond. Inst." No. 1.

(d) *Brown v. Coventry*, 1792, M. 14863; Bell, 8vo Ca. 310; *Greig v.*

Johnstone, *infra*. On the question, whether an entail of moveables is possible, see *Veitch v. Veitch*, 25 May 1808, F. C.; *Baillie v. Grant*, 21 May 1859, 21 D. 839.

(e) *Greig v. Johnstone*, 1 July 1833, 6 W. & S. 426.

principle, that unless a trust is interposed for the protection of the ulterior purposes, the substitutions are defeasible. The settlor left his estate, which consisted of two personal bonds and various sums of money, to his daughter, with a destination over (which the Court held to have the force of a substitution) in favour of certain nephews and nieces. The daughter uplifted all the funds, with the exception of one of the personal bonds; and laid out the money in various investments, which remained among her assets after her death. The Court held, that by the operation of changing the securities, the substitution was evacuated, and therefore sustained the claim of the lady's next of kin; but as regarded the sum in the bond which had *not* been uplifted (and which was payable to the settlor, "his heirs, executors, or assignees"), they held that the substitution had not been destroyed, and accordingly preferred the substitutes named in the settlement (a).

Ultrior Interests may be protected by means of a Trust.

There can be no doubt, however, as to the indefeasible character of substitutions in moveables, when the fee is vested in trustees for the life interest of parties successively substituted under the purposes of the trust conveyance. To what extent, in point of time, a moveable succession may thus be perpetuated, has never been determined. The provisions of the Thellusson Act, which we shall have occasion to consider in the third section, are directed only against *accumulations of interest*; and it does not appear that the common law of Scotland interposes any obstacle to the perpetuation of rational trusts of the capital of moveable property (b). In the Strathmore entail case Lord Brougham remarked, "In Scotland, the law, instead of discouraging perpetuities, gives them all manner of encouragement, and instead of confining the time to the lives in

(a) *M'Dowall v. M'Gill*, 19 June 1847, 9 D. 1284.

(b) See Bell's Com., 5th Ed. I. 38; Pr. § 1884; *Macnair v. Macnair*, 1791, M. 16210; *Cairnie v. Cairnie's Trs.*, 14 Nov. 1837, 16 S. 1; *Ireland v. Glass*, 18 May 1833, 11 S. 626; *E. Strathmore v. Strathmore's Trs.*, and *Suttie v. Suttie's Trs.*, *infra*. In *Macnair's* case the settlement was at first sustained, subject to the remark, per Lord Pres. Campbell, that the parties might after-

wards set it aside, if its provisions became inextricable; and such having been found to be the result, the settlement was afterwards reduced (per Lord Cuninghame in *Suttie v. Suttie's Trs.*, 14 Jur. 444). In *M'Culloch v. M'Culloch*, reported as a note in 5 W. & S. 180, a family settlement was reduced on the ground of inextricability; and the same principle was affirmed in *Mason v. Skinner*, 6 Mar. 1844, 16 Jur. 422.

being, and twenty-one years, with the time of gestation beyond, permits you, in every case, to tie up property for ever and ever, as may happen in one case in England, that of the reversion being in the Crown, and in that case only. . . . Real and personal property stand on precisely the same footing in Scotland" (a). The legality of private trusts in perpetuity was finally established by the judgment of the Court of Session in the case of *Suttie's Trs.* (b), sustaining a settlement which appropriated the revenues of heritable and moveable estate to the support of the younger children of the grantor's heirs of entail in all time coming, subject to certain powers of division, *to be exercised by their respective parents*, and with a destination over in default of heirs, upon trust for support of missions in India. Trusts of this nature, executed after 1st August 1848, would be cut down by the operation of sections 47 & 48 of the Entail Amendment Act, if the subject consisted of heritable property in Scotland.

A direction to trustees *to convey* to a party in fee with a destination over, is, in so far as regards the question of substitution or conditional institution, subject to the rules of construction applicable to destinations in conveyances. In the case of *Ramsay v. Ramsay*, where trustees were directed to convey the residue of an estate consisting of heritable and moveable property to the testator's eldest son, and the heirs whatsoever of his body, whom failing, to his second son, and the heirs of his body, with an ulterior destination, this was held to be a substitution, and to give the inheritance to the second son in preference to the executors of the eldest (c). But in the subsequent case of *Fyffe v. Fyffe*, where a sum of money was bequeathed to Charles Fyffe, who was insane, and "in the event of the death of the said Charles Fyffe, to two other parties therein named," it was held that this destination imported a conditional institution; and accordingly the executors of the first institute were preferred (d). And in *Allan v. Fleming* (e), where the destination was similar, the Lord Justice-Clerk Hope, with the approbation of the

Scus where Trustees are directed to convey.

(a) *Strathmore v. Strathmore's Trs.*, 5 W. & S. 193.

(b) *Suttie v. Suttie's Trs.*, 12 June 1846, 18 Jur. 442.

(c) *Ramsay v. Ramsay*, 23 Nov. 1838, 1 D. 88.

(d) *Fyffe v. Fyffe*, 13 July 1841, 3 D. 1205; *Allan v. Fleming*, 20 June 1845, 7 D. 908.

(e) *Allan v. Fleming*, *supra*.

Court, laid down the rule, "that when trust funds are to be divided and paid over, no substitution or destination is to be presumed after the trust is at an end, and when there are no means of protecting such destination. Cases relating to the relative interest of parties successively called during the subsistence of the trust had no application" (a).

Legacy to un-
ascertained
Class.

As a general rule, bequests in favour of persons not ascertained (*e. g.*, to "friends and relations," etc.) can only be rendered operative by means of a trust (b). The same remark applies to settlements of property to charitable uses, where it is usual to vest the trust estate in some public or corporate body having perpetual succession, in order to avoid the inconvenience of a lapse by the failure of trustees. By means of the appointment of a trustee, in whom confidence is reposed, charitable uses of a very indefinite character may be lawfully constituted; as in the case of *Crichton v. Crichton's Trs.*, where a legacy was left, to be "applied in such charitable purposes, and in bequests to such of my friends and relations, as may be pointed out," etc. (c); and again, in the case of *Black's Tr. v. Miller*, where a bequest was sustained, which had been left for the purpose of applying the proceeds "in yearly payments to faithful domestic servants, settled in Glasgow or the neighbourhood, who can produce testimonials of good character and morals from their masters and mistresses after ten years' service," etc. (d). A legacy to be laid out in charities at the discretion of trustees is not void on the ground of uncertainty (e); for although the terms of such a bequest do not denote any beneficiary whose title to sue could be recognised by the Court, yet the trustees will be bound, if they accept, to exercise the discretionary power conferred upon them; and if they commit a breach of trust, they may be called to account by the heir-at-law or representatives of the truster (f).

(a) 7 D. 913.

(b) *M'Cormack v. Barber*, 25 Jan. 1861, 23 D. 398, and cases there cited.

(c) *Crichton v. Crichton's Trs.*, 25 July 1828, 3 W. & S. 329, affg. 4 S. 553.

(d) *Black's Tr. v. Miller*, 14 July 1837, 2 S. & M'L. 866, affg. 14 S. 555.

(e) See *Black's Tr. v. Miller*, *supra*;

Dundas v. Dundas, 27 Jan. 1837, 15 S. 427; *Mags. of St Andrews v. Wemyss*, 17 July 1845, 17 Jur. 583.

(f) *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 914; *Campbell v. Macintyre*, 12 June 1824, 3 S. 126; and see *M'Ausland v. Montgomerie*, 1793, M. 2010. See Chapter VIII. (Implied Trusts).

Where funds are vested in the heritors and kirk-session of a parish for behoof of the poor, the trust may be enforced by action at the instance of any of the members of the parochial body (which is to certain effects regarded as a corporation (a)), or at the instance of inhabitants of the parish, alleging that they have an interest in the management and administration of the bequest (b). A bequest to the poor of a parish is not necessarily confined to persons who are legally entitled to demand parochial relief. This was decided in an action of declarator against a kirk-session entrusted with the management of a legacy "for the benefit and behoof of the poor in the said parish of Bathgate," concluding that the defenders were bound to hold and apply the same "in affording relief to such occasional or other poor of the parish who have no legal claim for relief under the Poor Law Act," 8 & 9 Vict. c. 83 (c). "The poor," said Lord President M'Neill (d), "neither in common parlance nor in law, are the persons only who are chargeable on the parish; for, besides these, there is another large body of 'the poor,' who are sometimes and very properly described as able-bodied poor, and who are not entitled to parochial relief; and, besides, there are many who may clearly be classed among 'the poor,' though having relatives bound to support them because they are poor, or from moral duty. There are others, again, who have just means enough to exclude them from right to parochial relief—who have no relatives, and who, from their circumstances of great poverty, are very properly considered generally as poor. And there do exist funds which the minister of the parish is authorized to administer to all these classes which I have described,—I mean the collections at church doors, and funds of that kind, which are handed over to the minister and kirk-session."

Trust for "the Poor."

By the Act 8 & 9 Vict. cap. 83, it is enacted, "That where any property whatsoever, whether heritable or moveable, or any revenues, shall at the time of the passing of this Act belong to or be vested in the heritors and kirk-session of any parish, or the magis-

52d Section of
Poor Law Act

(a) See *E. of Galloway v. Minister, etc., of Dalry*, 22 Feb. 1810, F. C.; *Heritors of Humble v. Minis. & Kirk-Sess.*, 1751, M. 10555; *Hamilton v. Minis., etc., of Cambuslang*, 1752, M. 10570.

(b) *Liddell v. Kirk-Sess. of Bathgate*, 14 July 1854, 16 D. 1075.

(c) *Liddell v. Kirk-Sess. of Bathgate*, *supra*; *Hardie v. Kirk-Sess. of Linlithgow*, 15 Nov. 1855, 18 D. 87.

(d) Lord Colonsay. 16 D. 1079.

trates, or magistrates and town council of any burgh, or commissioners, trustees, or other persons on behalf of the said heritors and kirk-session, or magistrates, or magistrates and town council, under any Act of Parliament, or under any law or usage, or in virtue of any gift, grant, bequest, or otherwise, for the use or benefit of the poor of such parish or burgh, it shall, from and after a time to be fixed by the Board of Supervision, be lawful for the parochial board of each such parish, or of the combination in which such parish or burgh may be respectively, to receive and administer such property and revenues, and the right thereto shall be vested in such parochial board" (a).

The Enactment may be excluded by adverse usage.

On the construction of this clause, it has been held that the description of funds referred to in the statute was not intended to include such funds as appear to be devoted, either by the terms of a bequest or by immemorial usage, to the support of a class of poor different from or more extensive than those who are legally entitled to parochial relief. And therefore, where it appeared that a fund mortified in 1707 had been applied for the relief of poor persons generally, including casual or occasional poor, the Court assailed the kirk-session from the conclusions of an action claiming the property on the behalf of the parochial board of the parish (b). In this case it was doubted whether property vested in the kirk-session to the exclusion of heritors fell within the scope of the vesting clause of the statute (c). On the same view, where a testator left a legacy "to the minister and kirk-session" of a parish, the Court found that this was not a bequest to the *heritors and kirk-session*, and did not fall within the operation of the 52d section of the Poor Law Amendment Act (d).

Enforcement by popular action.

Trusts vested in the heritors and kirk-sessions of parishes, in the magistrates of burghs or other public bodies, for the maintenance of schools, etc., may in like manner be enforced at the suit of individual members of the corporation, or by what has been called an *actio popularis*, at the instance of inhabitants interested in the foundation (e). The decisions relative to the administration and appro-

(a) 8 & 9 Vict. c. 83, § 52.

(b) *Hardie v. Kirk-Sess. of Linlithgow*, 15 Nov. 1855, 18 D. 37.

(c) 18 D. 40.

(d) *Liddell v. Kirk-Sess. of Bathgate*, 14 July 1854, 16 D. 1083.

(e) See *Kirk-Sess. of Monimail v. Esplinc*, 21 Nov. 1828, 7 S. 45; *Mason*

priation of funds mortified for such purposes will be considered in a future chapter.

Amongst rights of a *quasi* public nature which may be preserved by means of a trust, we may include the case of public trusts for the presentation of a clergyman to a benefice. The law of Scotland does not look with disfavour upon the system of presentation by means of popular election. On the contrary, a conveyance of a right of patronage to heritors or parishioners, to be exercised for behoof of a congregation, will receive effect, although there may be no formal declaration of trust purposes (*a*).

Trust for Presentation to a Benefice.

It may be observed that the Act 1690, cap. 23, abolishing patronages, vested the right of election in the heritors and elders, with a *veto* in the congregation; and although this Act was repealed by the 10th Anne, cap. 12, there is a reservation in § 2 of the rights of heritors and magistrates of burghs who had previously purchased the right of presentation to their respective parishes, and obtained a renunciation under the hand of the patron. The Act of Queen Anne applies to rights of patronage vested in those bodies in virtue of deeds of renunciation; and in this class of cases, accordingly, the election of a presentee will take place in the manner prescribed by the statute 1690, cap. 23. With reference to elections under the statute, it has been decided that the votes of the meeting are subject to scrutiny, and that the minutes of the meeting are not conclusive evidence of the proceedings; that the chairman has no casting vote; and that the Court may, after a scrutiny, declare the party in whose favour a legal majority of votes has been given to be duly elected (*b*). In a case where it appeared that the patrons of the parish, prior to the Act of Queen Anne, had not executed a deed of renunciation in terms of the statute, but had afterwards, on the narrative that the statutory sum of 600 merks had been paid to them by the heritors and liferenters, granted a deed of renunciation and conveyance in favour of the heritors and kirk-session, it was found that the heritors and kirk-session were not bound by the conditions of the Act 1690, but were clothed with an absolute

Usage upon Stat. 1690, cap. 23.

v. Scott's Trs., 23 Jan. 1836, 14 S. 843;
Milne's Trs. v. Cowie, 25 Jan. 1853,
15 D. 321; *Ross v. Heriot's Hosp.*, 14
Feb. 1843, 5 D. 589.

(*a*) *Brown v. Johnston*, 9 June 1830,
8 S. 899.

(*b*) *Stirling v. Campbell*, 1 July 1816,
6 Paton, 238.

right of patronage, to be exercised not by election, but by presentation (a).

Presentation
must be by
Deed.

With regard to the manner of appointment when the presentation is vested in trustees, it has been settled that the Court cannot take cognizance of any proceedings in the nature of resolutions, minutes, or votes of the presenting body (b). The appointment can only be made by a signed deed of presentation; and the validity of the election will depend entirely upon the number of signatures of qualified electors adhibited to that deed. Where there are competing deeds of presentation, the Court will accordingly give effect to that one which is signed by the largest number of qualified patrons (c).

Crown's re-
sulting Inter-
est.

It would seem that if a patron conveys his right to trustees, on trust to elect a minister subject to the approval of himself and his heirs, the right of veto reserved by the grantor is a personal privilege, and does not fall to the Crown by forfeiture (d).

Electoral Qua-
lification in
Popular
Trusts

The nature of the electoral qualification, where the patronage is vested in a popular body, was the subject of inquiry in a recent case. The patronage of the church was vested by private statute in the "hail inhabitants" of the parish (e). The following persons were found not to be entitled to vote as inhabitants, viz.: married women, persons living in family with their parents or others, and not being themselves householders in the parish; also servants, soldiers, lodgers, and visitors, not being householders in the parish, and persons known to be Papists. It may be observed, however, that previous cases have settled that a private patron is not disqualified from presenting by reason of Papacy (f). A minor may vote with consent of his curator (g), though the vote of the curator alone is invalid (h). Where the right of presentation was vested by deed in heritors and tenants in the parish, the Court excluded the votes

(a) *Cullen v. Sprott*, 17 Nov. 1840, 3 D. 70.

(b) *Brown v. Johnstone*, 9 June 1830, 8 S. 900.

(c) *Brown v. Johnstone*, *supra*; *Graham v. Smith*, 13 Dec. 1859, 22 D. 187; *Cullen v. Sprott*, 17 Feb. 1841, 3 D. 561.

(d) *H. M. Adv. v. Mag. of Stirling*, 5 Feb. 1846, 8 D. 450.

(e) *Graham v. Smith*, 13 Dec. 1859, 22 D. 187.

(f) *Baillie v. Morrison*, 28 Feb. 1822, 1 S. 363; *Presbytery of Inverness v. Fraser*, 10 June 1823, 2 S. 384.

(g) *Brown v. Johnstone*, 8 S. 902. See *Bankton*, 2, 8, 100; *More's Notes*, p. 43; *Connell on Parishes*, 43.

(h) *Stirling v. Campbell*, 1 July 1816, 6 Paton, 238.

of non-resident heritors and liferenters, but found that it was no objection that heritors or tenants were females (a).

SECTION II.

OF UNLAWFUL PURPOSES.

Trusts are said to be unlawful as contravening the policy of the law, when the trust purpose is either illegal or immoral in itself, or is coupled with a condition of which the law will not enforce the fulfilment (b). In the first case, the trust is altogether void; in the second case, the condition will be annulled, but the trust purpose will receive effect unless it is in fulfilment of a contract. In the present chapter we have to deal with the nature of the purpose only, the subject of conditions attached to bequests being reserved for discussion for the Third Part of this treatise.

Unlawful purpose distinguished from unlawful condition.

Unlawful trusts include such as fall under the categories of *malum prohibitum* and *malum in se*. There is, however, a third class of trust purposes which, though neither immoral in their object nor prohibited by any positive law, are yet discountenanced on grounds of public policy; for which reason the Court will not allow its process to be used for their enforcement.

Grounds of illegality.

In illustration of what is meant by trusts prohibited, we may refer to the case of *Blair v. Allan*, in which it was decided that a direction to pay "a free liferent annuity, exempted from all burden or deduction whatsoever," was, on the assumption that it imported an obligation for payment without deduction of income tax, illegal under the statutes 5 & 6 Vict. cap. 35, and 16 & 17 Vict. cap. 34 (c). Provisions granted to mistresses, which are assumed to be in consideration of cohabitation (d), or to illegitimate children *nascituri* (e), are examples of that class of trusts which are unlawful as

Three classes of illegal considerations distinguished.

(a) *Brown v. Johnstone*, *supra*.

(b) See *Stair*, 1, 12, 4.

(c) *Blair v. Allan*, 17 Nov. 1858, 21 D. 15; *Robson v. M'Nish*, 2 Feb. 1861, 23 D. 429; *Wall v. Wall*, 15 Sim. 513, 16 L. J. Ch. 305.

(d) *Hamilton v. Bonamy*, 1765, M.

9471; *Durham v. Blackwood*, 1622, M. 9469; *A. v. B.*, 21 May 1816, F. C.; *Johnstone v. M'Kenzie's Trs.*, 4 Dec. 1835, 14 S. 106.

(e) *Wilkinson v. Wilkinson*, 1 Y. & C. Ch. Ca. 657.

being granted for an immoral consideration (*a*). Trusts by which the emoluments of a public office are appointed to be held for behoof of a party other than the incumbent, fall under the third head of our enumeration; an instance of which will be found in the case of *Ord v. Hill*, where an agreement to hold the revenues of the office of Keeper of the Register of Sasines for Renfrewshire in trust, was treated as an illegal contract (*b*).

Latent Partnership prohibited in certain cases.

In *Gordon v. Howden* a reduction was brought of a latent partnership, by the trustee on the sequestrated estate of the ostensible partner, on the ground that it was illegal to enter into the business of pawnbroking, which was the object of the partnership, without advertising the names of all the partners in the manner required by the 33d section of the Act 39 & 40 George III. 99. The Court of Session repelled the reasons of reduction, holding, that as the Act imposed a penalty for the neglect of its provisions, it could not be held to nullify the contract. But the House of Lords reversed the judgment; and the case having been remitted back to the Court of Session, the latent partner was found only to be entitled to interest on his capital, and a commission for management, but to have no right to a share of the profits (*c*).

Latent Trusts of Shipping Property.

Under the provisions of the Navigation Laws, which were intended to prevent foreigners from acquiring an interest in British shipping, no interest in shipping property could be created in favour of any other person than the registered owner; and the Courts of law held themselves precluded from enforcing latent trusts even against the person of the trustee (*d*), unless perhaps in a question between the trustee and the creditors of the real owner (*e*). The Act now in force for the regulation of British merchant shipping (*f*) prohibits the entry of any notice of trust, express, implied, or constructive, in the Register Book, and confers on the assignees of the registered owner a title which cannot be affected by any trust in

(*a*) See Bell's Prin. § 37, where the cases are collected.

(*b*) *Ord v. Hill*, 21 May 1847, 9 D. 1118; *Thomson v. Dove*, 16 Feb. 1811, F. C.; but see *Haldane v. De Maria*, 6 Mar. 1812, F. C.

(*c*) *Gordon v. Howden*, 28 April 1845, 4 Bell, 254, and 9 Feb. 1853,

15 D. 378; *Fraser v. Hill*, 17 Jan. 1852, 14 D. 335.

(*d*) *Calder v. Miller*, 12 Nov. 1824, 3 S. 253; *Macarthurs v. Macbrair*, 20 June 1844, 6 D. 1174; *Ord v. Barton*, 3 July 1846, 8 D. 1011.

(*e*) *Scott v. Miller*, 16 Nov. 1832, 11 S. 21.

(*f*) 17 & 18 Vict. c. 104, § 43.

the person of the cedent. Under the present law, it has been held, that such trusts are enforceable *in personam*, against the trustee (a), though not *in rem* (b).

In the contracts of copartnery and settlements of English joint stock companies, it is usually conditioned that the company shall not be bound to take notice of trusts in their register of transfers. The object of this regulation being to give greater facility to transactions in shares, as well as to relieve the company from embarrassing claims, and such regulations being legitimate, they will be equally binding on the representatives or assignees of the original shareholders, as on those parties themselves. A truster may of course authorize his trustees to invest in the securities of such companies. In modern practice it is almost universal to give trustees a power to invest in shares; and where trusts are sanctioned by the company, no risk is incurred.

Exclusion of
Latent Trusts
by Deed of Co-
partnery.

An heir of entail cannot create a trust of the fee of the estate, subject to an obligation to reconvey the estate after his death to the heirs substitute of entail. For although a trust in those terms is not, in the words of the Act (c), a "deed whereby the samen may be apprized, adjudged, or evicted from the other substitutes in the tailzie, or the succession frustrate or interrupted;" yet, as it is a contravention of the statutory prohibition against disposing, there can be no doubt that the granter of such a trust would incur an irritancy. But an heir of entail may lawfully execute a trust disposition of his life interest in the estate and of the rents accruing during his lifetime, with a power to the trustees to enter into possession and administer the property. Such trusts have frequently been executed for behoof of creditors. As they leave the feudal estate in the person of the granter unimpaired, they cannot be held to import any contravention of the fetters of the entail (d).

Trusts of Tail-
zied Interests.

Rents falling under the life interest of future heirs are as much *extra commercium* as the estate itself; and even when they are subject to a faculty of burdening, the law will not allow any deviation from the conditions of the power. Thus a power to provide younger chil-

Rents of En-
tailed Pro-
perty.

(a) *Boyd's Exrs. v. Martin's Exrs.*, 16 June 1847, 9 D. 1234.

(b) See *Hay v. Cockburn's Trs.*, 19 July 1850, 12 D. 1298.

(c) Statute 1685, c. 22.

(d) *Fairlie's Tr. v. Fairlie*, 31 Jan. 1860, 22 D. 632; *Scottish Union Ins.*

Co. v. Graham, 19 Feb. 1839, 1 D. 532; *Boyd v. Boyd*, 5 July 1851, 18 D. 1302.

dren in three years' rent of the estate is not well executed by a bond for payment of the amount to trustees, on trust to pay the interest to children, and thereafter to invest the capital in lands; nor can a faculty of burdening the entail with provisions be delegated to trustees (a). But it is no objection to the exercise of such a faculty, that it is granted in satisfaction of obligations in a contract of marriage (b).

Trusts for
creating Votes.

By the law of England, it appears that conveyances for the purpose of creating votes for the election of members of Parliament, with a private arrangement that no interest shall pass, are null and void (c). But in Scotland, the purpose of the conveyance in such cases is not so much regarded as the actual title to the property; and accordingly, although the qualification is objectionable under the provisions of the Reform Act, yet, as it will not be presumed that the object in view was illegal, the conveyance of the property will stand; the interest of the beneficiary being liable to be dealt with as in other cases of latent trust, under the regulations of the statute 1696, cap. 25 (d).

Trusts exclud-
ing Benefi-
ciary's Credi-
tors.

According to English authorities (e), a trust cannot be created subject to the proviso that the interest of the beneficiary shall not be

(a) *D. of Northumberland v. M'Grogan*, 28 Aug. 1846, 5 Bell, 896.

(b) *Grierson v. Grierson*, 12 Dec. 1843, 6 D. 203.

(c) Lewin, Tr., 4th Ed. 81.

(d) *Lindsay v. Giles*, 27 Feb. 1844, 6 D. 771.

(e) The distinction was clearly laid down by Lord Eldon, who said (*Brandon v. Robinson*, 18 Ves. 429), that to exclude the assignee in bankruptcy, the estate must be given over to some one else, either expressly or by implication, *e.g.*, by a residuary destination. Words of appropriation to the maintenance of the grantee, — *e.g.*, "for his own personal maintenance and support," or "not to be liable to his debts, engagements, charges, or incumbrances," etc., — do not exclude the assignee (*Graves v. Dolphin*, 1 Sim. 66); nor can his right be defeated by clothing the trustees with discretionary powers, *e.g.*, to apply the rents and profits for the maintenance of the grantor's son, "at

such times and in such manner as they shall think proper for his life, . . . and that said son should not have any power to sell, or mortgage, or anticipate in any way the same rents and profits" (*Green v. Spicer*, 1 R. & M. 395; and *Snowdon v. Dales*, 6 Sim. 524). As to conditions that the estate shall not be alienated, see *Baggott v. Meux*, 1 Coll. 188; and *Re Sanderson*, 3 Jur. N. S. 809, where such conditions were held absolutely void. The only exception is a trust for the maintenance of a married woman; in which case, not only may the husband's rights be excluded by almost any form of popular language (*Jarman on Wills*, 3d Ed. II. 22), but that of his creditors may also be extinguished by the aid of a direction to trustees to pay to the wife, and "not by way of anticipation" (*Jarman*, II. 24). A trust in restraint of anticipation cannot be created for the benefit of a *feme sole* (*Barton v. Briscoe*, 603.)

alienated, or shall not be made subject to the claims of creditors (*a*); but the rule may be evaded by the settlement of a life interest upon the beneficiary, defeasible upon alienation, bankruptcy, or insolvency, with a limitation over to another party, in the nature of a resolutive clause, on the happening of these events (*b*). But it seems that a person is not allowed to settle his own property on himself with a limitation of this nature (*c*). The only Scotch case which could be supposed to sanction an alimentary conveyance in fee is that of *Balderstone*, in which the Court, with great difficulty, gave effect to an alimentary clause in a destination to a married woman, which was coupled with an express direction to trustees not to part with the capital during her lifetime (*d*).

On the principle that a power to give to another or to withhold a fund implies also a power to qualify the grant with all reasonable conditions, it is settled that a party may convey to another a life interest in funds or estate, on such conditions that it can neither be assigned nor attached by creditors except for alimentary debts. No particular form of words is necessary to the creation of an alimentary interest (*e*). But it would seem that an alimentary provision will not be protected if excessive (*f*); and indeed it is not easy to see upon what principle the mere application of the term "alimentary"

Trust of a
Liferent Ali-
mentary In-
terest.

(*a*) See Lewin, Tr., 4th Ed. 78-80; Jarman on Wills, 3d Ed. II. 20.

(*b*) For example, the interest of creditors may be excluded by a direction, if the liferenter "failed in the world, to pay the produce to the separate maintenance of his wife and children" (*Lockyer v. Savage*, 2 Stra. 947, the ruling authority); or to pay an annuity to the grantee only, not on any account to be alienated during his life, with a proviso, that "if so alienated, the said annuity shall cease" (*Dommett v. Bedford*, 3 Ves. 149). But in the cases of *Wilkinson v. Wilkinson*, Coop. 259, and *Lear v. Leggat*, 2 Sim. 479, and other cases, resolutive clauses of similar import were held to be only directed against voluntary alienation. See *Dorsett v. Dorsett*, 81 L. J. Ch. 122.

(*c*) Lewin, Tr., 4th Ed. 80; Jarman on Wills, *supra*.

(*d*) *Balderstone v. Fulton*, 23 Jan. 1857, 19 D. 298. The subject of alimentary trusts for married women is discussed in Part III. We note here, however, that by English law a "restraint on anticipation" loses its effect upon the dissolution of the marriage (*Barton v. Briscoe*, Jac. 603; *Jones v. Salter*, 2 R. & My. 208), agreeing with the Scotch case of *Martin v. Bannatyne*, 8 Mar. 1861, 23 D. 705; and that an alimentary trust cannot be created in England in contemplation of a future marriage (*Woodmeston v. Walker*, 2 R. & My. 197), contrary to the Scotch doctrine.

(*e*) Bell's Com. 528 (5th Ed. I. 128).

(*f*) See, however, *Monypenny v. E. of Buchan*, 13 S. 1112, and *Harvey v. Calder*, 2 D. 1099.

to a destination could be held to deprive the creditors of the beneficiary of their right to the use of diligence, or to withdraw the property from the operation of the vesting clause in the Bankruptcy Act (*a*). Nor would the addition of a resolute clause avail to fortify the title, as this (in the case of heritable property at all events) would amount only to the creation of an imperfect entail, defeasible by creditors under the 43d clause of the Entail Amendment Act (*b*).

Can a party reserve an Alimentary Interest to himself?

As to conveyances by a party upon trust for his *own* alimentary use, Lord Fullerton was clearly of opinion that such restrictions were ineffectual against creditors, even in a case where the ostensible purpose of the trust was the maintenance of the grantor's family (*c*). In the same case, Lord Jeffrey remarked that it was certainly not in the power of any man, *by calling his funds "alimentary,"* to secure them against the diligence of his creditors; though he agreed with the other judges in thinking that the settlement in question might receive effect as a post-nuptial contract, to the extent of securing a moderate provision to the wife (*d*). On the whole, it appears that the law of Scotland is not more favourable than that of England to restraints upon alienation. The only possible method of reserving an alimentary interest in property, is by executing and delivering a conveyance of the fee to another party, or to trustees for his behoof, with an exception of the grantor's alimentary life-rent; and even then, it would seem that the life-rent interest might be adjudged (*e*).

If power of disposal added, can the Creditors attach?

When a life-rent alimentary interest is limited to a beneficiary, under the purposes of a trust disposition, a power may at the same time be conferred on the life-renter to dispose of the fee either *mortis causa* or by deed *inter vivos* (*f*), provided there is added a destination over in default of the power being exercised (*g*). In the

(*a*) 19 & 20 Vict. cap. 79, § 102.

(*b*) 11 & 12 Vict. cap. 36, § 43.

(*c*) *Wright v. Harley*, 2 June 1847, 9 D. 1151.

(*d*) *Id.* p. 1160; and see *Campbell v. Stewart*, 13 June 1848, 10 D. 1280; *Darling v. Mein*, 20 Dec. 1857, 14 D. 296. The case of *Smitton v. Tod*, 12 Dec. 1839, 2 D. 225, is not exceptional, for the Court held that the truster had *absolutely* divested himself in favour of

his family. See Bell's Com. 528 (5th Ed. I. 128).

(*e*) *Barbour v. M' Minn*, 7 July 1826, 4 S. 806, where the question was also raised, whether arrestment was not the proper diligence.

(*f*) *Rollo v. Rollo*, 26 Jan. 1843, 5 D. 446.

(*g*) *Ness v. Waddell*, 3 Feb. 1849, Exch. Rep.; *Alves v. Alves*, 8 Mar. 1861, 23 D. 712.

case of *Rollo v. Rollo*, it was held that a general disposition *omnium bonorum* to a trustee for creditors could not be construed as an exercise of the faculty of disposal; but as the case was not decided until after the death of the liferenter, the question did not arise, whether he could have been compelled to exercise the power for the benefit of his creditors (a).

A trust may, even when not obnoxious to the charge of illegality, be ineffectual; as when the conveyance is in excess of the powers of the disponent, or when it disposes of property to which other parties have a preferable right. On this ground, a trust of the testator's whole moveable estate, without excepting legitim, will be ineffectual to deprive the children of their legal portion. This is not the place in which to enter on a discussion of the doctrines of legitim; and we only introduce the illustration for the sake of remarking that a father cannot withdraw his personal property from the legitim fund by a deed *inter vivos*, qualified by a reservation, either express or latent, of the grantor's liferent (b).

Trust in excess of powers.

It is not in the power of a heritable proprietor to perpetuate the legal order of succession in his family; for this would be to deprive the heir of the right of alienation, which is one of the most valuable incidents of property. On this principle, a trust to entail an estate upon the settlor's "lawful heirs" was held ineffectual even to fetter the institute; who was accordingly found to be entitled to a fee-simple conveyance (c).

Legal order of Succession cannot be perpetuated.

The effect of annexing an unlawful condition to a trust is, that the beneficiary takes the bequest without being bound by the condition (d). Such at least is the rule in regard to testamentary settlements. But in the case of trusts intended to take effect *inter vivos*, which are granted for onerous causes, the principle of the law of contract, under which the transaction would be entirely nullified,

Unlawful condition held *pro non scripto*.

(a) The subject of alimentary trusts for married women, and the construction and legal effect of clauses excluding the husband's rights, is treated in the Third Part of this volume.

(b) *Collie v. Pirie's Trs.*, 22 Jan. 1851, 13 D. 506, *per curiam*.

(c) *Leny v. Leny*, 28 June 1860, 22 D. 1272. The question, Whether an exclusion of heirs-portioners is a suffi-

cient alteration of the legal order of succession to form the basis of an entail, arose in the recent case of *Gordon v. Gordon*. The Lord Ordinary held that the entail was bad; but the action was afterwards dismissed without a decision of the point.

(d) *Fraser v. Rose*, 18 July 1849, 11 D. 1467; and see cases relative to restraints on marriage, M. 2963 *et seq.*

comes into operation (a). Again, where the *purpose* of the trust is unlawful, the principle is the same as in the case of contracts. Accordingly, the Court will neither assist the truster to recover the property (b), nor enforce the trust in favour of the beneficiary (c).

Court will not interfere to enforce restitution,

Thus, where a party who was desirous of having his son appointed to the office of a minister in a parish church agreed to pay an annuity of L.20 a year to a rival candidate for the benefice, upon condition of his withdrawing from the contest, the Court refused to entertain an action founded on the obligation (d). And where a party who had the right of presentation to a macership in the Court of Session had entered into certain illegal stipulations in connection with an appointment to the office, the Court held, that while they could not enforce performance of the stipulations in question, the grantee's breach of contract afforded no ground for reducing the presentation (e).

unless to protect the interests of Creditors.

Restitution will, however, be enforced where the interests of third parties are affected by the transaction, as, for example, in the case of unlawful agreements in defraud of creditors (f); and it would appear that money advanced to assist in carrying on an illegal undertaking may be recovered in an action of accounting (g). But although a party claiming repetition in the character of a creditor may be thus favoured, it would seem that the heir of a truster is in no more favourable a situation than the truster himself. Thus, where a lease was granted to a trustee for behoof of the truster's mistress, on which possession was enjoyed for several years, it was held, in an action of reduction by the heir, that the trust having been already fulfilled, the Court could not enforce restitution either at the instance of the granter or his representatives (h).

(a) *Stair*, 1. 3, 7, & 8; *Ersk. Inst.*, 3, 3, 85; *Bell, Pr.* § 49.

(b) *A. v. B.*, 21 May 1816, F.C. But see *Paterson v. Shaw*, 20 Feb. 1830, 8 S. 573; *Graham v. Pollock*, 5 Feb. 1848, 10 D. 646; and *Wilkinson v. Wilkinson*, 1 Y. & C. Ch. Ca. 657.

(c) *Johnston v. Mackenzie's Exrs.*, 4 Dec. 1835, 14 S. 106; *Kerr v. M'Dowall*, 14 Feb. 1828, 6 S. 546.

(d) *Maxwell v. Earl of Galloway*, 1775, M. 9580.

(e) *Bruce v. Grant*, 27 Feb. 1839, 1

D. 583; *Thomson v. Dove*, 16 Feb. 1811, F. C.

(f) *Arrol v. Montgomerie*, 24 Feb. 1826, 4 S. 499; *Whyte v. Johnstone's Trs.*, 22 Jan. 1819, 5 S. 40. But see *contrà*, *M'Taggart's Rep. v. Robertson*, 25 Jan. 1834, 12 S. 338.

(g) *Gordon v. Howden*, 9 Feb. 1853, 15 D. 378. But see *contrà*, *Gibson v. Stewart*, 3 Aug. 1840, 1 Rob. 260, revg. 12 S. 683.

(h) *A. v. B.*, 21 May 1816, F. C.

SECTION III.

TRUSTS FOR ACCUMULATION.

At common law there does not seem to be any restraint upon the power of a settlor to direct the accumulation of the proceeds of his property, heritable or moveable, provided the purpose of the accumulation is rational, and capable of being carried into effect (a). An accumulation in perpetuity, however, would not be tolerated; and there is authority for holding, that although the mere fact of the accumulation being for purposes indefinite and capricious may not be sufficient to stamp the trust with the character of illegality, yet, when the settlement is *inextricable*, or when it is intended for *too distant a contingency*, it will be ineffectual at common law (b). On this ground, a reduction having been brought of a settlement which contemplated the accumulation of the rents of heritable property for an indefinite period, for purposes not very distinctly expressed, but intended for the ultimate benefit of the Episcopal Church of Scotland, the Court referred the matter to an accountant; and on receiving a report from him that it would not be practicable to carry into effect any of the beneficial purposes of the trust, they reduced the settlement (c). The accumulation, it would seem, must be not only for a definite object, but also limited as to time and amount. An instance of the successful employment of the power of accumulation for the purpose of creating a fund for the support of a charitable institution, was mentioned by Lord Cuninghame, in the note to his interlocutor in the case of *Ogilvie's Trs.* (d), where he states that the fund bequeathed by John Watson for the establishment of an hospital in Edinburgh, which was originally (in 1781) only L.4700, had, in 1822, accumulated to the sum of L.90,000.

Trusts for Accumulation are effectual at Common Law.

Until the extension of the Thellusson Act, in 1848, to settlements of heritable estate, the legality of accumulations of the rents of lands in Scotland fell to be determined with reference to the common law principle here stated. In the case of *Strathmore v. Strath-*

Direction to accumulate Rents of Heritable Property.

(a) Bell's Prin. § 1884; *Macnair*, 1791, M. 16210; *Mason v. Skinner*, 6 Mar. 1844, 16 Jur. 422.

(b) Bell's Com., 5th Ed. I. 38.

(c) *Mason v. Skinner*, 6 Mar. 1844, 16 Jur. 422.

(d) 8 D. 1234.

more's Trs. a direction to accumulate the rents of an estate for the term of thirty years, or until the death of the longest liver of two persons named in the settlement, for the purpose of investing the accumulated fund in the purchase of lands to be entailed, was found not to be reducible on the ground of irrationality; and it was observed by Lord Brougham, that although there might be good grounds for setting aside an accumulation in perpetuity, the Court was not called upon to say for what length of time the produce of lands might be permitted to accumulate (a). In the case of *Keith's Trs. v. Keith*, the trustor's direction was to retain the management of certain heritable estates in Scotland until the death of a party named, if she should have no children, or until the majority of her eldest surviving child, if any; and during that period to levy and accumulate the rents and profits thereof, and lay out the same, after deduction of all expenses, in the purchase of lands in Scotland, to be entailed in manner therein directed. The argument was directed to the question, whether the Act 11 & 12 Vict. c. 36, operated retrospectively, so as to vest the produce of the accumulations in the trustor's heirs-at-law; but it was assumed, in consequence of the judgment in the *Strathmore* case, that the accumulation in question was not voidable at common law (b).

Thellusson
Act.

The period within which accumulations derived from Scotch property may lawfully take place, will now be determined in all cases by the provisions of the 39 & 40 Geo. III. c. 98, as extended by the 11 & 12 Vict. c. 36, § 41. Questions upon the construction of the Thellusson Act (c) may be resolved into three heads: 1st, as to the nature and extent of the accumulations annulled by the statute; 2dly, as to the party to whom such accumulations will result; 3dly, as to the exceptional accumulations permitted by the Act.

I. *Nature and Extent of the Statutory Prohibition.*

Terms of the
Statutory Re-
striction.

By the 1st section of the statute of Geo. III., on the narrative

(a) *Strathmore v. Strathmore's Trs.*, 23 Mar. 1831, 5 W. & S. 170-199; affg. 8 S. 530.

(b) *Keith's Trs. v. Keith*, 17 July 1857, 19 D. 1040. *Vide infra*, p. 124.

(c) It should have been called the

Anti-Thellusson Act; as it is directed against wills such as that of Mr Thellusson, a millionaire, who left all his money to be accumulated for the benefit of remote descendants.

that it is expedient that all dispositions of real or personal estates, whereby the profits or produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to restriction, it is enacted, that no person or persons shall, by deed, surrender, will, codicil, or otherwise howsoever, "settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such granter or granters, settlor or settlors; or the term of twenty-one years from the death of any such granter, settlor, deviser, or testator; or during the minority, or respective minorities, of any person or persons who shall be living, or in *ventre sa mere*, at the time of the death of such granter, deviser, or testator; or during the minority, or respective minorities only, of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce, so directed to be accumulated."

(1.) With regard to the question, What accumulations are forbidden? it was the unanimous opinion of the judges to whom the questions in *Lord v. Colvin* (a) were remitted, that *implied* as well as *express* directions were prohibited. In that case, the testator, Peter Cochrane, directed his trustees to divide the residue of his personal estate, and the whole accessories thereof, between his two sons (who both died without leaving issue before the conventional period of payment); and, after the usual clause of survivorship, he then, in the event of their death before the arrival of the period of payment, directed the trustees to convey the said residue, and whole accessories thereof, to the eldest surviving son, or otherwise to the daughters of Mrs Moorhouse. On the expiration of twenty-one years from the death of the testator, Mrs Moorhouse was childless; and the testator's next of kin accordingly instituted a suit in the Court of Chancery, in which they claimed the annual revenues of Mr Cochrane's personal estate subsequent to the 18th of June 1852, when the period of twenty-one years expired, and until the period of payment should arrive. The construction of Mr Cochrane's

Implied directions to accumulate are struck at.

Lord v. Colvin.

(a) *Lord v. Colvin*, 7 Dec. 1860, 23 D. 111.

Opinion of the
First Division.

settlement with reference to the provisions of the Thellusson Act having been referred to the judges of the First Division of the Court of Session, it was argued on behalf of the executors of the will, that the testator had nowhere expressly directed an accumulation of the interest, and he could not be supposed to have contemplated the failure of all the parties who were instituted antecedently to Mrs Moorhouse's children; and as the accumulation had thus arisen from a contingency unforeseen by the testator, and without any intention to disappoint his immediate representatives, the case did not fall within the purview of the statute. But the Court held that the thing prohibited was the actual accumulation of profits and produce in consequence of the settlement actually made by the testator,—distinguishing from the case of accumulations resulting from the operation of law, as may happen where the grantee is a minor or insane. “If,” said Lord Deas, “the Act were to be held inapplicable wherever there was no express direction to accumulate, it would be easy in all cases to evade its operation. If it were to be held inapplicable wherever it did not appear that the testator had it in view to evade it, that also would favour evasion, by involving an inquiry into what was passing in the testator's mind, which could not be satisfactorily answered. . . . I think it enough that the deed is so conceived, that to carry out its purposes in the event which has happened, there must necessarily be accumulation for a period beyond the twenty-one years” (a).

Opinion of the
Court of Chan-
cery.

This decision is in accordance with the opinions expressed by the Court of Appeal in Chancery in the most recent English case (b), where Lord Cranworth, Ch., observed that the distinction taken by the Master of the Rolls, between an accumulation *expressed* and an accumulation *implied*, was an unsound and impossible distinction; adding, “If a testator directs that to be done which, as a consequence, leads to an indefinite accumulation, he must, within the meaning of the statute, be taken to have directed accumulation.” (c). It may therefore be concluded, notwithstanding the fluctuations of opinion on the part of the Court of Chancery in previous cases (d), that the

(a) 23 D. 136.

(b) *Tench v. Cheese*, 19 Beav. 324,
L. J. Ch. 716.

(c) 24 L. J. Ch. 719.

(d) *Ellis v. Maxwell*, 3 Beav. 587,

10 L. J. Ch. 266; *Macdonald v. Bryce*,

2 Keen, 276, 7 L. J. Ch. 217; *Morgan*
v. Morgan, 4 De Gex & Sm. 170, 20

L. J. Ch. 109; *Elborne v. Good*, 14

Sim. 165, 13 L. J. Ch. 394; *Cor-*

Act will in future be taken to apply to all settlements directing accumulation, whether explicitly or implicitly.

(2.) The prohibition is understood to embrace accumulations in every form. It will be observed that the preamble of the statute supplies the interpretation of the word "accumulated;" for it is there used as a convertible term with the expression, "whereby the beneficial enjoyment thereof is postponed." Postponement of the beneficial interest in the profits and produce of an estate being the criterion, it is obvious that the addition of accruing revenues or dividends to capital after the period of twenty-one years is "accumulation," whether *the interest upon such annual dividends* be also accumulated, or not (a).

Addition of Simple Interest to Capital is "accumulation."

In *Keith's Trs. v. Keith* (b) there was a conveyance by the settlor, Viscount Keith, of the residue of his general estate, heritable and moveable, to trustees, upon trust to invest the same in the purchase of lands, the rents of which were to be accumulated until the death of his daughter, the Countess Flahault; and again invested in lands, with power to make intermediate purchases. It was attempted to bring this case within the exception of the statute as to Scotch heritage, on the ground that the accumulations after each purchase were the produce of lands. But the Court justly considered the manner of accumulation to be immaterial; and as the *source* of the fund was a moveable estate, held that the testator's representatives could not be deprived of the beneficial enjoyment of its produce for more than twenty-one years. The same construction had previously been put upon the statute with reference to a bequest of L.2000 out of a general residue, which sum the testator directed "to be invested in Government stock, and the dividends arising therefrom to be again and always invested in the funds, and to continue accumulating for 100 years (not presuming to carry my views further)," for the purpose of founding an hospital in Dundee. In this case the trustees had a power of sale, which it was necessary to exercise in order to realize the L.2000, which Lord President Boyle said was "the nest-egg" of the intended accumula-

Keith's Trs. v. Keith.

poration of Bridgenorth v. Collins, 15 Sim. 538; *Bryan v. Collins*, 16 Beav. 14.

same case as *Evans v. Hellier*, 5 Cl. & Fin. 114.

(b) *Keith's Trs. v. Keith*, 17 July 1857, 19 D. 1040. See on this point Lord Ardmillan's Note, p. 1053.

(a) *Shaw v. Rhodes*, 1 M. & C. 135;

tions. These were accordingly the produce of moveable property, and therefore liable to be cut down by the statute (a).

Period during which accumulations are allowed.

(3.) The period within which accumulations may lawfully take place cannot be extended by any act of the testator beyond the expiration of twenty-one years from his own death, or from the birth of a child then in utero. Accordingly, the accumulated fund falls to be paid over at the commencement of the twenty-second year from the testator's death, and not from the date when accumulation commenced (b); and the vicennial period is to be reckoned exclusive of the day of the testator's death (c). The different periods mentioned in the Act are alternative, not cumulative. None of them exceed twenty-one years; and the object of the enumeration evidently was to exclude the supposition that any of the cases of minority were to be regarded as exceptional. It may happen, however, that the donee who is to take the accumulated sum on the expiration of the statutory period is then an infant; and in that event, it has been said, a further vicennial accumulation may take place. Nay more, supposing the death of the donee to take place during minority, his legal representative may again be a minor; and thus, by a series of improbable contingencies, the capital may be tied up for an indefinite period. But this is not "accumulation." For, on the elapse of the first vicennial period, the donee, although a minor or incapable, takes a vested interest in the annual revenue, which must be applied, so far as needful, to his support; and in accumulating the surplus, the Court only exercises a discretionary power of doing what the minor might himself have done had he been *sui juris* (d).

Immaterial that a Vested Interest is created.

It is clear, from the words of the statute, that the period of distribution cannot be further postponed by merely giving a vested interest to the beneficiary without the right to demand immediate payment; for the beneficiary would be entitled to the rents and produce, as being the person who "would have been entitled thereto if such accumulation had not been directed" (e).

(a) *Ogilvie's Trs. v. Kirk-Sess. of Dundee*, 18 July 1846, 8 D. 1231.

(b) *Keith's Trs. v. Keith*, 17 July 1857, 19 D. 1057, per Lord Pr. M'Neill. The Court found that the accumulations were null "from and after the period of twenty-one years from the

death of Ld. Keith" (p. 1071). See also *Attor.-Gen. v. Poulton*, 3 Hare, 555.

(c) See *Lord v. Colvin*, 23 D. 114, where it is so computed.

(d) *Lord v. Colvin*, 23 D. 127, per Lord Ivory.

(e) 39 & 40 Geo. III. cap 98, § 1.

(4.) The Act does not annul any bequest connected with a direction to accumulate contrary to its provisions, but merely operates a transference of the intermediate rents and produce. It follows therefore, that the trustees ought to retain the estate or capital (increased by previous lawful accumulations) during the period prescribed by the testator, paying over to the statutory appointee the annual rents and produce after the twenty-first year, as they arise (a). However, in the *Dundee* case, where there was no party to take the accumulations but the foundation, the Court held that the kirk-session might take the bequest, free from the obligation to accumulate (a).

Act not necessary except as to accumulations.

II. *Who is entitled to the Surplus Revenues?*

The statute has provided, that "the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to, and be received by, such person or persons as would have been entitled thereto if such accumulation had not been directed" (b).

The expression selected by the author of the enactment is so general, that it can scarcely be said to convey any distinct impression as to the disposal of the resulting interest. In applying the rule of the statute to actual cases, the Court have, in addition to the task of eliminating the element of accumulation from the destination of the revenues, to attempt the solution of the problem:—Given, the testator's intention on the supposition that the distribution is to take place in a certain event; to find what his intention would have been, the distribution being supposed to take place on the occurrence of a different event. Looking at the matter analytically, we may say that the question is incapable of exact solution as a *quæstio voluntatis*. The general rule is, that unless an intention is expressed of separating the accumulations from the capital, they shall be held to follow its destination as accessories (c). By this principle, the testator's intention is ascertainable in one particular case, namely, where the beneficial interest has vested before the expiry of the statutory period of

How far the disposal of Surplus Accumulations is *quæstio voluntatis*.

Surplus Accumulations follow the Capital.

(a) *Ogilvie v. Kirk-Sess. of Dundee*, 18 July 1846, 8 D. 1243, per Lord Fullerton.

(b) 39 & 40 G. III. c. 98, § 1.

(c) *Lord v. Colvin*, 23 D. 131, per Lord Curriehill.

accumulation. Thus, if the direction were to accumulate for a time certain, or instantly ascertainable by reference to an event: and then to convey to *A. B. and his heirs*; the annual revenue would of course be payable to A. B., or his representative for the time being. But suppose the vesting of the capital is suspended by a conditional institution, is A. B. entitled to the accumulation? If he dies before the period of vesting, the result is, that the conditional institute, who under the settlement was entitled to the entire inheritance, gets only the capital (*a*). However, if we suppose the testator to have intended to give the institute a usufruct for the period between the twenty-first year and the term of payment (and some arbitrary supposition is required *ex figura verborum* of the statute), then, as soon as further accumulation became illegal, the usufructuary interest might be held to vest in the institute.

Effect of Survivorship Clause.

The same difficulty occurs in the case of a *joint* destination, with the right of survivorship; as, if a sum were to be divided amongst the children *nominatim* of A. B. (without the use of words importing severance). The annual proceeds must then either result to the testator's heir or residuary legatee, or the Court must proceed on the fiction of a vested usufructuary interest.

If the principal has not vested, the Surplus Accumulations result to the heir-at-law.

When the period of vesting is contingent on circumstances which do not emerge until after the twenty-one years have expired,—*e. g.*, the possibility of an institute being afterwards born,—the intermediate revenues result to the testator's executors and their representatives; or to the heir-at-law, where they are the proceeds of heritage. This was decided in the cases of *Keith's Trustees* and *Lord v. Colvin*, the circumstances of which have been already narrated. In the latter case it was argued, on the authority of *Dick v. Gillies* (*b*), that the proceeds ought to go to the parties who would have been the testator's executors if his life had been prolonged until the expiration of the statutory period of accumulation. But this view was strongly repudiated by the Court, Lord Deas alone doubting, but not dissenting. A general residuary clause in favour of existing persons would doubtless be sufficient

(a) See *Griffiths v. Vere*, 9 Ves. 127, 135; *Shaw v. Rhodes*, 1 M. & Cr. 135, and Mr Lewin's remarks (Tr., 4th Ed.

73) on the effect of successive limitation of real estate.

(b) *Dick v. Gillies*, 4 July 1828, 6 S. 1064.

to exclude the testator's legal representatives (a). It would be endless to pursue the subject of the application of intended accumulations through the varying conditions developed by the law of vesting. Enough has been said to indicate the principles upon which such questions are determined.

III. *What Accumulations are excepted?*

The 2d section of the Act declares, "That nothing in this Act contained shall extend to any provision for payment of debts of any granter, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any granter, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this Act had not passed." And by section third it is declared, "That nothing in this Act contained shall extend to any disposition respecting heritable property within that part of *Great Britain* called *Scotland*." But this section was repealed by the Entail Amendment Act, section 41 (b), which recites the third section of the Thellusson Act, and on the narrative that "it is expedient that the provisions of the said Act (39 & 40 Geo. III.) should be extended to heritable property in Scotland," enacts, "That the said provision and enactment of the said recited Act shall be and the same is hereby repealed, and the said Act shall in future apply to heritable property in *Scotland*." As to the disposal of the accumulated proceeds of property or funds subject to the trusts of a deed directing the execution of an entail, we refer to the second section of a subsequent chapter on the execution of such trusts (c).

Terms of the
Statutory Ex-
ceptions.

In the absence of native authority (d) on the construction of the second section of the original Act, it may be sufficient merely to mention the points that have been decided in the English Courts. By *children* are to be understood *legitimate* children generally of

As to raising
Portions for
Children.

(a) *Pursell v. Newbigging*, 25 Nov. 1856, 19 D. 71.

(b) 11 & 12 Vict. cap 36, § 41.

(c) Chapter XVIII. Section II.

(d) There is one Scotch case,—*Suttie*

v. Suttie's Trs., 12 June 1846, 18 Jur. 442. Here a perpetual trust for raising provisions for younger children was sustained.

the granter ; or children *pecially* named of some other party taking interest under the will. And such interest must be substantial, not elusory ; but if substantial, it is no objection that it is not an interest in the particular fund which is made the subject of accumulation. Finally, it is held that the portions referred to are portions raised *out of the revenues*, not by adding the revenues to the capital. The cases are referred to in Mr Lewin's treatise (a).

As to Rents
of Entailed
Property in
Scotland.

The case of *Keith's Trs.* decided that the 41st section of the Entail Amendment Act had no application to trusts in existence prior to that Act ; so that the rents of heritable property might be the subject of continued accumulation under a pre-existing trust, which had been already in operation for more than twenty-one years (b).

(a) Lewin, Tr., 4th Ed. 75.

President McNeill's opinion, 19 D.

(b) *Keith's Trs. v. Keith.* See Lord 1058.

CHAPTER VII.

OF THE CONSTRUCTION OF TERMS OF CONVEYANCE.

UNDER this head we propose to consider the meaning and effect of the various forms of destination which are of usual occurrence in trust deeds, and also the meaning of those general terms, whether descriptive of the subject of conveyance or of the quality of the interest taken in it, which have received a fixed construction, that construction being either uniform, or, as in some cases of variable import, depending on intention presumed from the scope and purpose of the deed.

Subject defined.

SECTION I.

OF THE TERMS DESCRIPTIVE OF THE HEIRS OF THE DESTINATION.

Before proceeding to an examination of the meaning of particular expressions, it is necessary to take some notice of the distinction which has been established in the law of England, not without some fluctuation of opinion among eminent judges (a), between *executory* trusts and trusts *executed*. "A trust executed," says Mr Lewin, "is where the limitations of the equitable interest are complete and final; in the executory trust, the limitations of the

Distinction betwixt Trusts executory and executed.

(a) Lord Hardwicke, for example, said, "This distinction never has been established by any direct resolution, though said *arguendo*; and were it to be examined to the bottom, it might sound strange how it should be established.

All trusts in notion of law are executory" (*Bagshaw v. Spencer*, 1 Ves. 152). But his Lordship afterwards renounced this opinion; *Exel v. Wallace*, 2 Ves. 323.

equitable interest are intended to serve merely as minutes or instructions for perfecting the settlement at some future period" (a). In the former class of trusts, the rule of construction is to adhere strictly to the fixed meaning of technical words; in the latter, a more liberal canon of interpretation has been thought justifiable. The doctrine of favourable construction in executory trusts is explained in the following passage from the opinion of the Lord Chancellor (b), in the case of *Jerroise v. Duke of Northumberland*: "Where there is an executory trust, that is, where the testator has directed something to be done, and has not himself completed the devise, the Court has been in the habit of looking to see what was his intention; and if what he has done amounts to an imperfection with respect to the execution of that intention, the Court inquires what it is itself to do, and it will mould what remains to be done so as to carry that intention into execution. . . . But there are cases where the testator has clearly decided what the trust is to be; and, as equity follows the law, where the testator has left nothing to be done, but has himself expressed it, there the effect must be the same, whether the estate is equitable or legal."

Liberal interpretation of Executory Trusts.

Although in the interpretation of technical words descriptive of the class of persons who are to succeed as heirs of the destination, the general rule of construction is to give those words the same meaning in deeds of trust which they would receive in ordinary conveyances (c), there is no doubt that the law of Scotland sanctions a certain latitude of interpretation in the case of trusts of an executory nature; as, for example, where in trusts of heritable property trustees are directed to execute a strict entail on a specified order of heirs; and the Court allows the addition of a clause carrying the estate to the eldest heir-female (in order to preserve the entail), where the estate would otherwise have gone to heirs portioners (d). "The question," said Lord Justice-Clerk Hope,

(a) Lewin, Tr., 4th Ed. 85.

(b) Lord Eldon. 1 J. & W. 570.

(c) *Baillie v. Tennant*, 1766, M. 14941; *Murray v. Flint*, 1774, M. 14952; *Campbell v. Campbell*, 1770, M. 14949; *Dykes v. Dykes*, 9 Feb. 1811, F. C.; *Bowie v. Bowie*, 23 Feb. 1809, F. C.; *Blair v. Blair*, 16 Nov.

1849, 12 D. 110, per Lord Moncreiff.

(d) *Sprot v. Sprot*, 22 May 1828, 6 S. 833; *Forrest's Trs. v. Forrest*, 14 Dec. 1845, 8 D. 304; *Alexander v. Alexander*, 12 Dec. 1849, 12 D. 348, per Lord Fullerton; *Hunter v. Nisbet*, 14 Nov. 1839, 2 D. 16.

“being one as to the fulfilment and *execution* of the purposes and directions of the truster, the Court have adopted the principle—surely the only sound principle in such cases—of carrying out that purpose in the way warranted by one, and a most natural construction, of the terms employed, and in which alone the express purpose of the truster can be secured” (a). But the Court will not, even in the case of an executory trust, sanction any material deviation from the terms of the direction; and so, when trustees were directed to invest stock for behoof of the settlor’s daughters in liferent and their issue in fee, it was found that the trustees could not confer a power of disposal on the liferenters upon failure of issue (b). And we shall see in the sequel of the chapter that a direction to trustees to take securities in name of a party in liferent and his children in fee, must be executed literally, although the effect of strict compliance with the direction is to vest the fee in the parent.

We refrain from entering more at large in this place upon the subject of executory destinations; for although the principles applicable to the interpretation of such trusts are substantially the same in both parts of the kingdom, it cannot be said that the distinction between trusts executory and executed has been recognised in Scotland in such a manner as to necessitate a separate discussion of the subject.

How far the distinction is recognised in the Law of Scotland.

As to destinations to “heirs,” “heirs and assignees,” “heirs whatsoever,” etc., when occurring in settlements or contracts of marriage (c), it is to be observed, that the word “heirs” is in its own nature flexible, and must be construed *secundum subjectam materiam*. Although in its most simple acceptation it applies to the heir-at-law, yet a destination to heirs where the subjects of conveyance are moveable,—as, for example, sums of money (d), personal bonds, the interest in a contract of copartnery (e), or a residuary interest under a general settlement (f),—will carry the subject to

Meaning of “Heirs and Assignees,” “Heirs whatsoever,” etc.

(a) 8 D. 307.

Hailes, 87; *Kinloch v. Kinloch*, 1678,

(b) *Stewart’s Trs. v. Stewart*, 20 Dec. 1851, 14 D. 298.

3 Br. Sup. 218.

(c) As to destinations to heirs in title-deeds, they are of no force in competition with a previous unrevoked general disposition (*Weir v. Steele*, 1745, M. 11359).

(e) *Irvine v. Irvine*, 15 July 1851, 13 D. 1367.

(d) *Robertson v. Robertson*, 1766,

(f) *Ersk.* 3, 8, 47 and 48; *Bank.* 3, 5, 51; *Blair v. Blair*, 16 Nov. 1849, 12 D. 97. See *Graham v. Hope*, 17 Feb. 1807, F. C.; and see cases of *Cathcart* and *Angus*, *infra*, p. 180.

the executors or next of kin. If the subject of the conveyance is heritable, as landed estate or money heritably secured, a destination to heirs, however inconsiderable the property may be, will be construed as a settlement in favour of the heir-at-law (a). If the settlement embrace both heritable and moveable estate, a direction to convey to heirs or successors is held to import a trust for the heir-at-law as regards the heritage, and for the next of kin as to the moveable property (b). In one case the word "heirs" has been construed into "heirs of the body" (c); but this construction was afterwards discountenanced as too lax (d).

Case of Children taking in the character of "Heirs whatsoever."

When the settlor's own children are the parties to whom the succession would fall in virtue of a destination to "heirs," they are not regarded as favoured parties; and therefore, as the law formerly stood, the issue of predeceasing children were excluded from the succession; because the condition *si hæres decesserit* was held to apply only to the institution of heirs specially favoured on the ground of relationship (e). But since the passing of the Moveable Succession Act, (f), grandchildren take an interest in the succession by way of representation.

Origin and effect of the term "Heirs whatsoever."

The expression "heirs whatsoever," or "heirs whomsoever," which has the same force as "heirs," is employed in limited destinations to avoid the ambiguity that might result from the use of the word "heirs" without addition, where, in a previous part of the deed, a more limited class of heirs of the same person has been mentioned. The expression "heirs whatsoever," equivalent to "heirs-at-law" (g), is therefore employed, in contradistinction to the heirs of the investiture elsewhere mentioned. The ordinary

(a) *Fairservice v. White*, 1789, M. 2317; *Dykes v. Dykes*, 3 Feb. 1811, F. C.; *Bowie v. Bowie*, 23 Feb. 1809, F. C.; *Home v. Watson*, 1757, 5 Br. Sup. 330; *Farquharson v. Farquharson*, 1756, M. 6596, 2290. See cases in Br. Syn. 2329.

(b) *Blair v. Blair*, *supra*; and see Ersk. 3, 8, 47, as to the relative rights of heir and executor under bonds of corroboration of heritable debts.

(c) *Lockhart v. E. of Eglinton*, 1767, M. 6370.

(d) *Thorburn v. Thorburn*, 18 Mar. 1858, 20 D. 829, 836.

(e) *Black v. Valentine*, 17 Feb. 1844, 6 D. 689; *Hamilton v. Hamilton*, 8 Feb. 1838, 16 S. 478; *Wishart v. Grant*, 1763, M. 2310; and see *Richardson v. Donaldson's Trs.*, decided on appeal, 14 Feb. 1862.

(f) 18 Vict. c. 23, § 1.

(g) *Douglas v. Douglas*, 1777, M. 14930, 5 Br. Sup. 467; *Brodies v. Brodie*, 1749, 5 Br. Sup. 466; *Richardson v. Stewart*, 5 July 1821, F. C. and 1 S. 105; 2 S. Ap. Ca. 149.

construction of the term may, however, be made to bend to the manifest intention of the settlor wherever construction is *necessary* to make the destination intelligible (a). But as the expression, “heirs whatsoever,” can, in any view, mean no other than the legal representatives of the settlor, supposition as to the settlor’s *probable* intention is excluded; and accordingly a direction to execute an entail in favour of heirs whatsoever (who are not in law capable of taking a tailzied succession), will not be construed as implying an exclusion of heirs portioners so as to create a tailzied destination (b).

On the question, whether a destination to “heirs whatsoever” will exclude the heir of conquest, the following distinctions have been recognised. It has been settled by the case of *Miller v. Miller’s Trs.* (c), that when the succession opens to the “heirs whatsoever” of a *beneficiary as conditional institutes*, the heir of line is the heir meant to be designated; because the party whose heirs are in question having died before the succession opened, it could not by any stretch of construction be considered *feudum novum* of him. The word heir, in these circumstances, falls to be construed *designativè*, and in that view must be held to denote the principal line of succession. It is still an open question, whether, in the event of heirs whatsoever claiming as *substitutes* under the destination, the heir of conquest should not be preferred, seeing the lands actually were conquest (*i.e.*, vested in the institute) before the succession opened to his heirs (d). Again, conversely, if the settlor calls his *own* heirs whatsoever, on the failure of a specified order of heirs, then, if the succession has already vested in one of the parties specially called, the settlor’s heir of line, and not the heir of conquest, is held to be called by the expression “heirs whatsoever;” for the quality of the settlor’s estate, as heritage or conquest, in his person is of no materiality after the estate has passed into other hands (e). But in the event of the failure of all the heirs in the specified line of succes-

Whether the
Heir of Con-
quest is ex-
cluded.

(a) *Bell v. Grieve*, 22 May 1840, 2 D. 880; *Hay v. Crawford*, 1698, M. 14899; *M’Lachlan v. Campbell*, 1757, M. 2312; and see *Stair*, 3, 5, 12; *Ersk.* 3, 8, 48.

(b) *Leny v. Leny*, 28 June 1860, 22 D. 1272; *D. of Hamilton v. Douglas*, 1762, M. 4358; *Baillie v. Tennant*, 1766, M. 14941.

(c) *Miller v. Miller*, 19 Jan. 1831, 7 W. & S. 1, affg. 9 S. 295; *Boyd v. Boyd*, 1774, M. 3070, *Hailes*, 577, F. C.

(d) See *Brown v. Campbell*, 16 Mar. 1855, 17 D. 759.

(e) *Robison v. Robison*, 3 June 1859, 21 D. 905.

sion before the settlor, thereby throwing open the succession to heirs whatsoever *as institutes*, Lord Neaves thought the heir of conquest might come in, if the property were conquest, for he is then succeeding to his own ancestor (*a*). A destination to heirs and assignees is held to apply only to *assignees* of the vested interest; for so long as the institute has but a *spes successionis*, his interest cannot be assigned by deed or testament so as to extinguish the contingent interest of the heirs of the destination (*b*).

Meaning of
"Heirs" where
conversion di-
rected.

The rule that a destination to "heirs whatsoever," or "heirs and assignees," carries the heritage to the heir-at-law, and the moveable property to the executors, must be taken subject to the explanation that the intention of the settlor must determine whether the whole or any part of his estate is to be dealt with as heritable or moveable succession. Where the ascertainment of the settlor's intention depends upon the construction of powers of sale or implied directions, the character of the succession as heritable or moveable is the first point to be determined. As to that point, the principles of interpretation are not exactly uniform, but are dependent on the manner in which the question arises; *e.g.*, Whether under a destination to heirs and assignees (*c*), or at the instance of the Crown in an information for legacy duty (*d*), or in a claim by the heirs-at-law to lapsed succession (*e*). The subject is reserved for discussion in a separate chapter.

"Heirs" con-
ditionally in-
stituted not
entitled to
claim as "Sur-
vivors."

If under a postponed distribution of a capital fund the destination is taken to certain parties *nominatim* and their "heirs," and to the survivors of the parties named, the heir of a predeceasing grantee, although he receives his ancestor's share in virtue of the destination, can take nothing under the clause of survivorship. Nor

(*a*) 21 D. 911; quoted with approval in the judgment of the Court, 21 D. 915.

(*b*) *Bell v. Cheape*, 21 May 1845, 7 D. 614.

(*c*) *Cathcart v. Cathcart*, 26 May 1830, 8 S. 803; *Murray v. E. of Rothes*, 30 June 1836, 14 S. 1049; *Patrick v. Nichol*, 7 Dec. 1838, 1 D. 207; *Meiklam's Trs. v. Mrs Meiklam's Trs.*, 2 Dec. 1852, 15 D. 159; *Gardner v. Ogilvie*, 25 Nov. 1857, 20 D. 105; *Buch-*

anan v. Young, 13 Mar. 1860, 22 D. 979; *White v. White*, 28 June 1860, 22 D. 1335.

(*d*) *Adv.-Gen. v. Williamson*, 23 Jan. 1840, 13 D. 436, and Exch. Rep.; *Adv.-Gen. v. Anstruther*, 2 July 1842, 13 D. 450, and Exch. Rep.; *Adv.-Gen. v. Smith*, 1 Mar. 1852, 24 Jur. 285, and Exch. Rep.

(*e*) *Neilson v. Stewart*, 3 Feb. 1860, 22 D. 646.

will the *conditio si sine liberis* be extended to such a case; for in a destination to *survivors* there is plainly no presumption of an intention to benefit the children of those who do *not* survive (a).

In the case of a succession opening to the next-of-kin of an institute, under a destination to "A. and his heirs," the following questions may also arise. (1). Does the character of "heirs" attach to the *legal* personal representatives of the institute, or does it attach to those who would have stood in that relation to him, if he had died *at the period of vesting*? The question must be answered in favour of the legal representatives. To prolong the life of an institute *fictione juris*, for the purpose of bringing into the category of his heirs a class of persons who in fact are not his heirs, is too violent a construction to be tolerated by a Court of law. The point was virtually decided in *Lord v. Colvin* (b); for although the heirs whose ascertainment was in question, were those of the settlor himself, and although they were conditionally instituted, not by will, but by the force of the Thellusson Act, the logic of the decision is applicable to the present question. (2). Assuming that the succession must flow in the legal channel, is it confined to the *immediate* heirs of the institute? We think not. Such of the immediate next-of-kin as may predecease the term of vesting, transmit a *spes successionis* to their heirs—not of course by way of "representation" under Section 1 of the Succession Act—but by force of the destination to *heirs*; that word being *genus generalissimum*, and comprehending heirs of the second or any ulterior order. According to this view, the *jus crediti* under the settlement might devolve upon brothers-uterine of an immediate next-of-kin, failing brothers consanguinean; or upon his widow, to the extent of her *jus relictae* (c).

At what period
the character
of Heir at-
taches.

By *Pearson v. Corrie*, it was decided, in the case of a simple institution of the "lawful heirs of A. B.," that if A. B. survive the settlor, the vesting of the succession is not to be suspended until the death of A. B., in order to the ascertainment of the class entitled to succeed as his heirs; but, on the contrary, that the *presumptive heirs* of A. B. may divide the succession immediately on the testator's death (d).

Unconditional
institution of
Heirs of a
Party in life.

(a) *Richardson v. Donaldson's Trs.*, decided on appeal, 14 Feb. 1862.

(c) *Ibid.* See the Narrative, p. 113.

(b) *Lord v. Colvin*, 7 Dec. 1860, 23 D. 111, overruling *Dick v. Gillies*, 4 July 1828, 6 S. 1065.

(d) *Pearson v. Corrie*, 28 June 1825, 4 S. 119.

Maxwell v. Wylie.

In *Maxwell v. Wylie*, where a testator in a certain event left a bequest to "the heirs who by law would be entitled to succeed to my heritable estate," it was decided that the bequest belonged to the representatives of the person entitled to serve heir-at-law to the testator, and not to the party who would have been heir had the settlor survived the period of distribution (*a*).

"Executors or nearest of kin."

In a destination to "executors or nearest of kin," the second term is restrictive of the first; so that the husband of the defunct cannot, as her "executor," exclude the next of kin from the succession (*b*).

Meaning of "Heirs Male," etc.

When special terms of destination are used in trust deeds, as "heir of line" or of conquest, "heir-male," and "heir-female," they have the same meaning as in other conveyances. "Heir of line" means the heir-at-law exclusive of the heir of conquest (*c*). "Heir-male of line" means heir-male excluding the heir of conquest (*d*). "Heir-female" applies to the heir-at-law, whether male or female, excluding heirs-male. A destination to "heirs-male, whom failing, to heirs-female," is virtually, although not in all its legal consequences, equivalent to a destination to heirs whatsoever on the failure of the male line of descent (*e*). "Heir of the body," when used in reference to heritage, applies to any person in the direct line of descent from the institute (*f*).

Meaning of "Heirs and Children," etc.

In marriage-contract destinations, the terms "children" and "bairns" are sometimes used in connection with the word "heir." In such cases, the word "heir" is the governing term, and gives the law of the succession, unless such construction is contradicted by an intention manifested in some other part of the settlement. Thus, a destination of moveable property to heirs and children of the marriage, would in the ordinary case be equivalent to a bequest of the beneficial interest to the settlor's executors; though it has been said that a power reserved to provide for the younger children would by

(*a*) *Maxwell v. Wylie*, 25 May 1837, 15 S. 1005. And see *Lord v. Colvin*, 7 Dec. 1860, 23 D. 111, and cases there cited.

(*b*) *Lawson v. Stewart*, 24 Jan. 1826, 4 S. 384.

(*c*) *Stair*, 3, 5, 10; *Bell's Prin.* § 1696.

(*d*) *Sinclair v. Countess of Fife*, 1766, M. 14944; *aff.* 5 April 1767.

(*e*) *Dalrymple v. Hope* (Bargany case), 27 Mar. 1739, 1 Paton, 237; *Lyon v. Blair*, 1739, 5 Br. Sup. 663; *Ewing v. Miller*, 1747, M. 2308.

(*f*) *Forrester v. Hutchison*, 11 July 1826, F. C. and 4 S. 824; *Innes v. Ker*, 1807, M. Tailzie, No. 13. The Court does not recognise a restriction to heirs of a certain clan (*M'Gillivray v. Souter*, 12 Mar. 1812).

implication give the fee to the heir-at-law; for the law does not presume an intention to create a burden on the fee in favour of the fiars themselves (a). On the other hand, a destination of heritage to heirs and bairns has been interpreted as a gift to the whole children; as in settlements of burgage property (b); or where, from the position of the settlor, it was presumed that he could not have intended to preserve the estate in his family (c); or where an intention to provide for the whole family was deducible from the terms of the settlement (d). With regard to conquest heritage, the authorities are conflicting (e), although the latest decisions are favourable to the right of the whole children in the case of a general destination of conquest to heirs (f). The reason for giving a preference to the whole children in destinations of conquest heritage was thus forcibly stated by Lord Eskgrove, in a passage preserved by Mr Fraser (g): "Where it (the expression "heirs and bairns") occurs in settlements of money, I am clear that the sum descends among the whole; and this is also just, in considering settlements of conquest, where land is acquired under them, because it is acquired with money. But in settlements of special heritage, especially if not burghal, the word *heirs* limits the application of the word *bairns*, and indicates that the bairns were meant to take in their order seriatim, as the law should call them" (h).

in dispositions
of heritable
estate.

When terms designative of issue are used without the adjection of the word "heirs," construction is excluded; and accordingly, whether the destination be to bairns (i), or to children of the mar-

Meaning of
"Children,"
"Issue," etc

(a) Bank. 3, 5, 48; *Scott v. Scott*, 1684, M. 12842; but see *contrà*, *Dollar v. Dollar*, 1792, M. 13008.

(b) *Fairservice v. White*, 1789, M. 2317; but see as to burgage lands, *Dollar v. Dollar*, *supra*.

(c) *Rankine v. Rankine*, 1736, M. 14931, *Elchies' Notes*, 300; *Scott's Crs. v. Scott*, 1760, M. 985.

(d) *Wilsons v. Wilson*, 1769, M. 12845, *Hailes*, 313; *Lamond v. Lamond*, 1776, M. Appx. Prov. to Heirs, No. 1; and see *Ersk. 3, 8, 48*; *Campbell v. Campbell*, 1739, 5 Br. Sup. 214; *Home v. Watson*, *supra*.

(e) *Wilson v. Wilson*; *Rankine v. Rankine*, *supra*; *Allardice v. Smart*, 12 Feb. 1722, Rob. Ap. Ca. 399; and see *Stair*, 3, 5, 52, *Dirl. & St.* 72, in favour of the children; and *contrà*, *Bank. 3, 5, 50*; *Bell's Prin.* § 1977, *comp.* § 1963; *Campbell v. Campbell*, *supra*.

(f) *Ponton v. Trotter*, 24 Jan. 1832, 4 Jur. 401.

(g) 1 Pers. and Dom. Rel. 786.

(h) MS. Note on *Fairservice v. White*, 1789, *Hume's Sess. Papers*.

(i) *Brown v. Brown*, 1680, M. 12842 and 2375. See *Grant v. Gunn's Trs.*, 28 Feb. 1833, 11 S. 484.

riage, the succession, whether in lands (a), heritable securities (b), or moveable property (c), vests in the whole children equally, subject to the conditions of the settlement. A general assignation by a father, to children of a second marriage, of an equal share and proportion, along with his other children by his former marriage, of all his estate and effects, heritable and moveable, vests the succession in the children of both marriages equally *per capita* (d). The term "issue," which is of frequent occurrence in Scotch deeds of trust, seems to be equivalent to *liberi*, or descendants. To avoid ambiguity, it should be declared expressly that issue are to succeed *per stirpes* (e).

Exclusion of Legitim.

And if a settlor declare that the provisions secured by his ante-nuptial contract in favour of "the children of the marriage" shall be taken in satisfaction of legitim and executry, the exclusion of legitim will be held to apply to the heir as well as to the younger children, although the heir's provision consists of an heritable estate upon which the portions are secured (f).

Executory destinations in Entail Trusts.

The subject of executory trusts of money or heritable estate for the purpose of investment in the form of an entailed destination, will be considered in the subsequent chapter; and it will be seen that, in the interpretation of such trusts, the Court has put a liberal construction upon the expressions "entail" (g), "daughter" (h), "substitute" (i), etc.

Words importing substitution. "Whom failing," etc.

As to the meaning and force of words importing substitution, a distinction has been taken between "and" as a word of substitution, and "whom failing" (k). The former is the more flexible

(a) *Herries v. Herries*, — 1806, Hume, 528; *Wilson v. Wilson*, 14 June 1811, Hume, 534; *Kibble v. Stevenson's Trs.*, 16 Feb. 1832, 10 S. 341.

(b) *Carnegie v. Clark*, 1677, M. 12840.

(c) *Waddell v. Pollock*, 19 June 1828, 6 S. 999.

(d) *Bannerman v. Bannerman*, 15 Dec. 1801, Hume, 130.

(e) *Grant v. Gunn's Tr.*, 28 Feb. 1833, 11 S. 484.

(f) *Maitland v. Maitland*, 14 Dec. 1843, 6 D. 244; *Keith's Trs. v. Keith*, 17 July 1857, 19 D. 1040.

(g) *Sprot v. Sprot*, 22 May 1828, 6 S. 833; *Forrest's Trs. v. Forrest*, 14 Dec. 1845, 8 D. 304.

(h) *Martin v. Kelso*, 24 Feb. 1857, 2 Macq. 556, affg. 15 D. 960.

(i) *Mackenzie v. Mackenzie* (Seaforth case), 13 May 1822, 1 S. Ap. Ca. 150, revg. 24 Nov. 1818, F. C.; *Forbes v. Forbes*, 5 July 1853, 15 D. 809; *Seton v. Seton*, 1 Mar. 1854, 16 D. 658.

(k) As to whether these words import a conditional institution or substitution, see the Chapter on Vesting.

term. A bequest to A. and another *nominatim* is not a substitution, but a joint destination; but a bequest to "A. *and* his heirs," or to "A. *and* his lawful children" or issue, is a substitution of those persons on failure of A.; and even the addition of the words "in equal proportions" has not the effect of bringing in the children of A., the institute, along with A. himself; its effect being merely to give a divisible interest to the children (a). The effect of the word "and" when used to connect different orders of heirs, is to substitute those mentioned in the second order to each member of the first class distributively. Thus, a destination to the "heirs-male of the body" of an institute, "*and* the heirs whatsoever of the body of the said heirs-male," gives the succession to the heirs whatsoever of the first heir-male succeeding to the estate; although, if the expression "whom failing" were used, the entire male line of succession of the institute must be exhausted before the succession could open to heirs whatsoever (b).

SECTION II.

OF THE TERMS DESCRIPTIVE OF THE NATURE OF THE INTEREST CONVEYED.

With regard to the effect of general words descriptive of the subject of conveyance, the following rules may be laid down:—

First, A particular specification of subjects belonging to one of the two categories of heritable or moveable, although followed by general words *ejusdem generis*, has the effect of restricting the conveyance to the kind of subjects specially enumerated. On this principle, a conveyance of insight plenishing, household furniture, and other moveable goods, was held not to include *nomina debitorum* (c). So also it was held, that a conveyance of "all my plate, and horses, and "moveables whatsoever," would not include a personal bond, seeing that there was no mention in the enumeration of moveable rights (d).

Effect of particular followed by general words *ejusdem generis*

(a) *Edward v. Shiell*, 12 Feb. 1848, 10 D. 685; *Grant v. Gunn's Tr.*, 28 Feb. 1833, 11 S. 484.

(b) *Lockhart v. Macdonald*, 15 Mar. 1842, 1 Bell, 202, affg. 15 S. 376.

(c) *Ker v. Young*, 1745, M. 2274.

(d) *Dunbar's Trs. v. Dunbar*, 15 Jan. 1808, Hume, 267; *Mochrie v. Linn*, 1736, M. 5018.

And in a more recent case (a), it was held that the expression, "whole other moveable estate," following an enumeration of corporeal moveables, did not enlarge the right of the donees to the effect of including moveables other than corporeal (b).

Where the
general words
apply to differ-
ent subjects.

Secondly, General words following a particular enumeration, applicable to a different description of estate, receive effect according to the natural meaning of the words (c). Thus, a disposition of "every subject, whether heritable or moveable" (d), or "every moveable and immoveable subject" (e), in conjunction with enu-

(a) *Carsewell's Trs. v. Carsewell*, 9 Feb. 1858, 20 D. 516.

(b) It seems the general rule in England is, that words of a comprehensive import only receive their full extent of operation where the form of the disposition is not restrictive. For example, in a gift of furniture, plate, household goods, and other goods, to one person, and the residue of personal estate to another, the Court, not to disappoint the residuary legatee, restricted the words "other goods" to corporeal moveables (*Woolcomb v. Woolcomb*, 3 P. W. 112); and in a later case, the Chancellor of Ireland, Lord St Leonards, ruled that the words "all other chattel property," annexed to a bequest of household furniture, plate, and house-linen, must be held to mean other chattel property *ejusdem generis*, partly on the ground that there was a subsequent residuary gift (*Lamphier v. Despard*, 2 D. & War. 59; see also *Barrett v. White*, 24 L. J. Ch. 724). In the most recent case a bequest of "The whole of my capital in ready money, and in bank billets" (Russian paper), was held to imply only a special bequest of the subjects described; the Lords Justices reserving their opinion as to the law, the word "and" had been used instead of "in," (*Wylie v. Enohin*, 29 L. J. Ch. 341; Affd. 3 April 1862).

(c) In *Woolam v. Kenworthy*, 9 Ves. 137, a residuary gift of "estate" was restricted to personalty by the

controlling effect of the context, although the will contained a specific devise of lands; Lord Eldon observing, that the question, whether "all my estate and effects" will include real estate or not, depends, first, on the immediate context of the will; and, secondly, on the general form and scheme of the will as demonstrating intention. A similar decision was pronounced by the King's Bench in *Helting v. Geud*, 2 B. & P. N. R. 214, on the construction of the word "property," followed by an enumeration of "goods, stock, bills, bonds, book debts, and securities." When the law became more settled, the rule was laid down absolutely, that unless an intention to restrict appear from the context of the will, general words, although associated with words descriptive of personalty, will carry the real estate. "The doctrine of modern cases is, that where there is nothing to qualify the word 'estate,' it will carry real as well as personal estate; and the contrary intention ought to appear to induce the Court to put upon that word a less extensive signification than it naturally bears." (Per Sir W. Grant in *Barnes v. Patch*, 8 Ves. 607.) The cases are fully commented on in Jarman, I. 681 *et seq.*

(d) *Glover v. Brough*, 7 Dec. 1810, F. C.

(e) *Welsh v. Cairnie*, 28 June 1809, F. C., and case there cited. Comp. *Brand v. Brand*, 1734, M. 15941.

merative words, is a good conveyance of lands and heritages. The rule, that "estate" (a) carries both real and personal property (which is a rule of general jurisprudence), was authoritatively settled by the Judicial Committee of the Privy Council in the case of *The Mayor of Hamilton v. Hodson*, decided on appeal from the Court of Chancery in Bermuda (b). Lord Brougham observed: "The word 'estate,' is *genus generalissimum*, and will by its own proper force, without any proof, *aliunde* of an intention to aid the construction, carry the realty as well as personalty; and is not to be confined and restrained to personalty only, unless there is a clear intent expressed in other parts of the will, to be gathered either from the will, or from the way in which the word is used in the particular part of the will where the contested use of it arises" (b).

Thirdly, But the words of general conveyance must be such as are appropriate to the quality of the property meant to be conveyed, otherwise the intention cannot receive effect. For example, "goods and gear, whether heritable or moveable," is an obvious misnomer unless intended to apply to heirship moveables. A conveyance in those terms is therefore ineffectual to carry even a lease of heritable property (c). It would seem that a general conveyance, however broad, does not operate as a revocation of a previous alimentary provision (d).

General words, to be effectual, must be appropriate.

Although there are decisions determining that the general words, "means and effects, heritable and moveable," are inoperative as a conveyance of heritable property, such as bonds or leases (e), it would seem that they are sufficiently descriptive of the *universitas* of the settlor's estate as to receive effect according to the intention when occurring in the less formal clauses of a trust disposition, as, for example, in a destination of residue (f). At all events, they

What words will include Heritage.

(a) See *Neilson v. Stewart*, 22 D. 647.

(b) *Mayor of Hamilton v. Hodson*, 6 Moore, P.C. Ca. 76, see 82.

(c) See *Paterson v. Farish*, 9 Feb. 1800, Hume, 128; *Sutherland v. Jeffrey*, Feb. 1805, Hume, 133; *Ross v. Ross*, 1770, M. 5019, and see *M. voce* "General Assignment."

(d) *Thomson v. Lyell*, 15 S. 32.

(e) *Brown v. Bower*, 1770, M. 5449; *Cockburn v. Cockburn*, 18 Nov. 1808,

Hume, 131. "Means and estate" seems to be the most appropriate general expression when heritage is meant to be included, and the words "heritable and moveable" should be added. See *E. of Eglinton's case*, *infra*.

(f) *Adv.-Gen. v. Williamson*, *infra*. "Effects, of what nature and kind soever," in a conveyance to trustees, held by Lord Langdale to include real estate, in *M. of Titchfield v. Horncastle*, 2 Jur. 610.

have been so interpreted in the residuary destination of a general succession, where, in consequence of an implied direction to sell, it was held that the settlor had intended to deal with the beneficial interest as a moveable succession (a). "Heritage," being equivalent to heritable estate, is a perfectly general term, and carries everything that would have gone to the heir-at-law, including leases (b). On the principle of favourable construction in executory trusts, a special legacy of heritable property, expressed in words of bequest, will receive effect according to the intention, provided there is a good dispositive conveyance to the trustees (c).

What words
will carry
lands held
under a defective Entail.

Whether a general conveyance of heritable estate will carry property held under the conditions of a defective entail, is a question of intention to be resolved on somewhat similar considerations to those which have obtained in questions between heirs of the investiture and general disponees. Thus, a disposition to trustees of a small subject—about forty-five acres—"and all other lands," was held not to operate as a conveyance of a considerable entailed estate in a question with the heir of the investiture (d); while, on the other hand, a disposition by an heiress of entail to the next substitute beneficially of "her whole means and estate, heritable and moveable," was sustained as a title of possession to prescribe immunity from the conditions of the trust in virtue of which the entail had been executed (e).

(a) *Adv.-Gen. v. Williamson*, 23 Jan. 1840, Exch. Rep. & 13 D. 436 (affd. 16 Mar. 1843, 2 Bell, 89). It would seem, on the authority of English precedents, that the appointment of a "residuary legatee" carries the realty, if the deed contains a general conveyance of real and personal estate to trustees. See the cases of *Evans v. Crosbie*, 15 Sim. 600, where a testator gave all his real and personal estate to trustees, upon trust to pay certain legacies, and appointed his brother to be his residuary legatee; and *Wildes v. Davies*, 1 Sm. & Gif., where the appointment was made by a codicil to a trust settlement, conveying freehold, copyhold, and leasehold estates, and also personally, with a direction to sell, etc. Other words properly applicable to personalty,

as "worldly goods" (*Wright v. Skelton*, 18 Jur. 445), "personal estates" (*Tofield v. Tofield*, 11 East. 246), "said house, goods and chattels" (*Roe v. Walker*, 3 B. & P. 375), have been extended to real estate by force of the context; but it is very doubtful whether such cases would be received as precedents by the Court of Session.

(b) *Duncan v. Rae*, 15 Feb. 1810, F. C.

(c) *Redford v. Redford*, 5 Dec. 1816, Hume, 884.

(d) *Hepburn v. Hepburn*, 10 Feb. 1860, 22 D. 730.

(e) *E. of Eglington v. E. of Eglington et al.*, 28 May 1861, 23 D. 1369. See *Weir v. Steele*, 1745, M. 11359; *Thomson v. Lyell*, *supra*.

Some other expressions of common occurrence in dispositive clauses and residuary destinations may be briefly noticed. "Surplus" is equivalent to "residue;" and in estimating its amount, all legacies and debts must be deducted (a). "Free rents" is equivalent to surplus produce of heritable property. Interest on heritable debts, and the expenses of the trust are to be deducted (b). "Interest of free money" has been held to include the surplus annual proceeds of the whole of the settlor's moveable funds, whether invested in securities or in bank, under deduction of debts, but not, as it would seem, of legacies (c). But by a later decision (d) it was ruled that "surplus cash," which in a popular sense may be said to be synonymous with "free money," would not carry securities, such as bonds or bills, although the testatrix had left no other funds except what she had invested in such securities (e).

"Surplus,"
"Free Rents,"
"Interest," etc.

(a) *Hamilton v. Bennet*, 14 Feb. 1832, 10 S. 330.

(b) *Morrison v. Knight's Trs.*, 14 Feb. 1837, 15 S. 560.

(c) *Smith v. Donaldson*, 10 June 1829, 7 S. 734.

(d) *Jarvie v. Pearson*, 5 July 1860, 22 D. 1395.

(e) The following abstract of the leading English decisions on the construction of words descriptive of the subject of the bequest may find a place here, though, in the strict order of arrangement, many of them ought rather to be treated under the head of Special Legacies:—

Effects.—"Effects of what nature or kind soever," in a special legacy, held not to comprise the general residue, per Sir W. Grant in *Rawlings v. Jennings*, 13 Ves. 39; and see *Hotham v. Sutton*, 15 Ves. 319.

Goods.—"Household furniture, plate, . . . and all other goods of whatever kind," left to A., followed by pecuniary bequests to B., C., and D. Lord Langdale held that, in consequence of the subsequent bequests, the general words must be restricted to goods *ejusdem generis* (*Wrench v. Jutting*, 3 Beav. 521). "Goods, wearing

apparel of what nature and kind soever, except my gold watch," held by Lord Hardwick to comprise wearing apparel, personal ornaments, and furniture. "All goods and things of every kind and sort whatever," which should be found in a certain closet, held not to include cash (*Roberts v. Kuffin*, 2 Atk. 113; and *Gibbs v. Lawrence*, 30 L. J. Ch. 170). "Jewels, plate, and other goods" held to include residue (per Sir J. K. Bruce in *Parker v. Marchant*, 1 Y. & C. 290).

Property.—"All my property, of whatever nature or kind, in a certain house," held not to carry mortgage securities, personal bonds, or bankers' receipts, on the ground that these have no locality (per Lord Redesdale in *Fleming v. Brooke*, 1 Sch. & Lef. 318). "Monies, goods, etc., my property," held by Sir J. Leach to be sufficient to pass the residue (*Kendall v. Kendall*, 4 Russ. 360). "L.1000; also my wines and property in England;" held by Lord Cottenham that the whole property in England, consisting of wines, stock, cash in bank, etc., was bequeathed (*Arnold v. Arnold*, 2 My. & K. 365.)

Personal Estate.—This expression is

Legacy of
Interest may
carry the Prin-
cipal.

Where a legacy is given of the interest of a fund without appropriating the capital, it seems to be a simple question of intention whether the capital is intended to vest in the legatee. And this would also seem to be the principle of construction followed in England; the rule that a bequest of interest includes the principal, as stated by English writers of authority, being qualified by the observation, that the construction must be consistent with what appears to be the intent of the testator (a). In *Sanderson's Executors v. Kerr* (b), a bequest of capital was implied from a direction to executors to invest L.2000 for the benefit of the testator's son and daughter equally, and as to each of the shares, to pay the interest thereof, or apply it to the use of his said son and daughter, subject to the declaration, "that I leave it to my executors entirely in what manner to apply these sums, whether to pay the same directly, or apply it and pay it to others for behoof of my son and daughter." This case may be compared with *Burnsides v. Smith* (c), where a direction in nearly similar terms was held to import only a discretionary power in the trustees, which had lapsed by non-exercise during the lifetime of the beneficiary.

Extent of the
Interest con-
veyed to the
Beneficiary.

The next point falling to be considered with reference to the construction of destinations, is the extent of the interest conveyed. It is the more necessary to attend carefully to the legal meaning of

nomen generale for personalty; see *Martin v. Glover*, 1 Coll. 269.

Estate and Effects.—We have already seen (p. 136, note) that the word "estate," although followed by an enumeration of corporeal moveables, conveys the real property, and *a fortiori* it carries the personalty (*Fisher v. Hepburn*, 14 Beav. 267).

Capital.—See *Wylie v. Enohin*, 29 L. J. Ch. 341, and cases there cited. The meaning of words which in *terminis* are descriptive only of specific subjects will fall to be discussed in the chapter on Legacies.

(a) Roper on Legacies, II. 1475; Williams on Executors, 5th Ed., II. 1074. To this extent at least the doctrine appears to have been fixed by Sir W. Grant's judgment in *Page v. Leav*

ingwell, that in the case of a legacy of stock, "an indefinite gift of the dividends gives the absolute property of the stock" (16 Ves. 463-7). This is considered so well settled, that in a recent case, where a testator gave his servant the half-yearly interest of L.1000 stock, with a power of disposal (which would naturally imply an intention to give a life interest only), Sir John Romilly ruled that it was an absolute gift to the legatee, "with a superadded power to dispose of it by her will, but which does not derogate or detract from the prior absolute gift" (*Southouse v. Bate*, 16 Beav. 132).

(b) *Sanderson's Executors v. Kerr*, 21 Dec. 1860, 23 D. 227.

(c) *Burnsides v. Smith*, 10 June 1829, 7 S. 735.

words in this part of the destination, because the expressions "fee," "liferent," "conjunct," and "use," have each of them a flexible meaning, varying in accordance with settled rules of interpretation, which are based upon a consideration not only of the relation in which the heirs of the destination stand to the settlor, but also of the relation which they bear to one another.

Fee and Liferent.

When an estate is given simply without limitation as to time, that is, of course, presumed to be an estate in fee. The interest of the beneficiary, accordingly, will not be cut down to a liferent by the use of expressions capable of being read as substitutions (a). And, as a general rule, express words are necessary to limit an estate to a life interest (b); and so, when a liferent was given by a husband to his wife, "in case she should happen to survive him," and she predeceased, it was found that no right to the proceeds of the property had ever vested in her (c).

When a Fee is presumed.

First, as to destinations in favour of two or more persons not members of the same family. A destination to such persons in "conjunct liferent," or in "conjunct fee," imports a joint estate for life or in fee, as the case may be, with right of accrescion to the survivor, or, as it is sometimes called, the "right of survivorship" (d). In the case of a destination to strangers in conjunct fee and liferent, the grantees, according to Prof. Bell (e), are joint fiars during their joint lives; but the survivor enjoys his own fee of the one half and only a liferent of the other, the fee of which descends to the heir of the predecessor. In other words, the disponees have only a right in severalty in the fee. But why, we would ask, is a different canon of construction to be applied to the destination of the fee from that which is applied to the liferent? On principle, it is clear that the survivor of two stranger conjunct fiars has the *jus accrescendi*. The words, "and liferent," appear

Conjunct destinations to Strangers.

(a) *Alexander v. Alexander*, 13 Dec. 1843, 12 D. 345; *O'Reilly v. Sempill*, 2 Macq. 288, affg. 15 D. 789.

(b) See *Campbell v. Campbell*, 30 May 1843, 5 D. 1083; 3 Dec. 1852, 15 D. 173. In this case a liferent was given *ex figura verborum*, and a fee was held to be raised by implication, carrying the estate to the heirs of the

liferenter, in preference to the settlor's heir-at-law.

(c) *Findlay v. Macintyre*, 11 Dec. 1849, 12 D. 325.

(d) *Stair*, 2, 3, 37 & 42; *Ersk.* 3, 8, 35; *Bisset v. Walker*, 1799, M. Death-bed, No. II.; and see *Bell, Fr.* § 1879.

(e) *Bell's Prin.* § 1709.

to be surplusage. A destination to the parties jointly, and to the survivor and *their* heirs, imports a joint interest in the fee, with the right of survivorship, and a substitution to the heirs of the survivor.

Conjunct destinations to Spouses and to Children.

Secondly, as to destinations in marriage-contracts or family settlements. Before entering upon the subject of the interpretation of conjunct destinations in *executory* trusts, in which the natural meaning of the words receives effect as far as possible, it will be necessary to present a summary of the definitions which have been affixed by judicial decision to words of joint destination in direct conveyances; premising that the decisions make no distinction between money provisions and destinations of heritable property. "The decisions of the Scotch Courts," said Lord Campbell, "make no distinction between land and money in this respect; and with regard to money, treat a disposition to the parent for life, remainder to the children *nascituri*, without the word 'alienably,' as in effect a simple destination, which may be defeated by the parent who is considered the *fiar*" (a). The extension of the feudal maxim, that a fee cannot remain in suspense, to destinations of personalty, was regretted by many of the eminent lawyers of the past generation; so much so, that Lord Corehouse said that the Court would decline to go further in that direction than was warranted by the exact terms of former judgments, or to extend a doctrine in itself so questionable (b). However, it is now fixed that the construction of words determining the extent of the interest, is not affected by the quality of the subject of conveyance.

Liferent with destination to children *nominatim*.

A destination to a parent in *liferent*, and to his child or children *nominatim* in fee, receives effect according to the natural meaning of the words, whether the conveyance proceed from a stranger or from the parent himself (c); though in the latter case, as the *liferent* is one by reservation, the adjection of a power of disposal is held equivalent to a reservation of a fee-simple interest during the grantor's lifetime (d).

(a) *Mackintosh v. Gordon*, 17 April 1845, 4 Bell, 105; see 119, per Lord Campbell.

(b) *Mein v. Taylor*, 8 June 1827, 5 S. 781.

(c) *Mackintosh v. Mackintosh*, 28 Jan. 1812, F. C.

(d) *Cumming v. Adv.-Genl.* 1756, M. 15854, 4268; *Baillie v. Clark*, 23 Feb. 1809, F. C.; *Dickson v. Dickson*, 7 Feb. 1780, Hailes, 865.

A destination to spouses “in conjunct fee and liferent,” in the general case, gives the entire fee to the husband, and a joint liferent to both parties (*a*), contrary to the natural meaning of the expression, which, as we have seen, imports a destination of the fee to the surviving spouse, subject to the burden of the liferent (*b*). And it makes no difference in the result whether the conveyance proceeds from the husband himself, from a stranger (*c*), or from the wife’s father (*d*); nor does the form in which the liferent interest is limited affect the construction (*e*). But if the subject of the conveyance be the wife’s separate estate, it is quite settled that a destination in “conjunct fee and liferent” does not transfer the fee to the husband; the presumption in such cases being, that the granter intended to reserve the fee, and to give only a liferent interest to the surviving spouse (*f*). And an interest in the fee of property conveyed by the husband or a stranger, may be conferred upon the wife by a clause of conditional institution in favour of the survivor (*g*).

“Conjunct Fee and Liferent.”

The construction of destinations, by which a joint interest in liferent is given to the spouses, and a fee to the children *nascituri* or children of the marriage, is precisely the same as that of destinations in conjunct fee and liferent; that is to say, a conveyance from a stranger in joint liferent gives the fee to the husband, unless the survivor is conditionally instituted as fiar in express terms (*h*); while, on the other hand, a conveyance from either of the spouses, with a destination over to the heirs of the marriage, leaves the fee untransferred in the person of the granter (*i*).

Conjunct Liferent with destination to children *nascituri*.

With reference to the class of cases discussed in the preceding paragraph, it is sufficient for our present purpose to observe, that

Restriction to Liferent use only.

(*a*) *Wilson v. Glen*, 14 Dec. 1819, F. C.; *Madden v. Currie's Trs.*, 22 Feb. 1842, 4 D. 749.

(*b*) See Bell's Prin. § 1709.

(*c*) *Wilson v. Glen*, *Madden v. Currie's Trs.*, *supra*.

(*d*) *Fisher's Trs. v. Fisher*, 19 Nov. 1844, 7 D. 129.

(*e*) *Wilson v. Glen*, *supra*.

(*f*) *Cameron v. Young*, 28 June 1837, 15 S. 1205; *Wilson v. Reid*, and *Jameson*, *infra*.

(*g*) *Burrows v. M'Farquhar's Trs.*, 6 July 1842, 4 D. 1484; *M'Gregor v. Forrester*, *infra*; *Scott v. Maxwell*, 22 May 1850, 12 D. 932.

(*h*) *M'Gregor v. Forrester*, 18 Apr. 1835, 1 S. & M'L. 441, affg. 9 S. 675.

(*i*) *Wilson v. Reid*, 4 Dec. 1827, 6 S. 198; *Jameson v. Strachan*, 27 Jan. 1835, 13 S. 318.

"Conjunct fee"
not susceptible
of construction.

the construction of the word "liferent" as equivalent to "fee," where the fee is *ex figura verborum* given to children *nascituri*, was originally forced upon the Court in order to prevent the anomaly of a fee being kept in suspense before the birth of children. Afterwards, when the intention to limit the parents' interest to an estate for life was strongly manifested, as by the use of the word "allenary" in connection with *conjunct liferent*, the fiction of a fiduciary fee to be taken by the liferenter, for behoof of the unborn children, was admitted (a). The distinction thus established between "liferent" and "liferent use allenary" in destinations of heritable property, has since been extended to all family provisions, whatever the nature of the property. But a restriction of a "conjunct fee and liferent," or of a right in "conjunct fee or liferent," to the liferent use allenary of one (b) or both (c) of the spouses, will not prevent the fee from vesting in the spouse who, as formerly explained, is entitled to it in respect of the source from which the property was derived. For, as the restriction to a liferent use is inconsistent with the force of a destination in "conjunct fee and liferent," the Court will endeavour to reconcile the expressions by supposing an intention to confer a fee on the party from whom the estate has come, or on the husband *propter personæ dignitatem*, and to restrict the right of the other to a liferent use (d). And it would seem that even in a destination by one of the spouses to themselves "in conjunct liferent," the restrictive construction which has been put on the word "allenary" will yield, as in the case of other liferent rights by reservation, to the presumption which a power of disposal is held to furnish of the granter's intention to retain the fee (e).

(a) *Gerran v. Alexander*, 1781, M. 4402; *Newlands v. Newlands' Cr.*, 1794, M. 4289, *affd.* 26 Apr. 1798, 4 Paton, 43; *Thomson v. Thomson*, 14 Dec. 1812, 1 Dow, 417, and 5 Paton, 654; *Watherston v. Rentons*, 1801, M. 4297; *Harvie v. Donald*, 26 May 1815, F. C.; *Allardice v. Allardice*, 1795, Bell's fol. Ca. 156; *Napier v. Scott*, 14 Feb. 1826, 2 W. & S. 550; *Dixon v. Fisher*, 1 July 1833, 6 W. & S. 431. The word "alimentary" seems to be of equivalent force; *Douglas v. Sharpe*, 9 Mar. 1811, Hume, 173.

(b) *Wilson v. Glen*, 14 Dec. 1819, F. C.

(c) *Wilson v. Reid*, 11 Dec. 1827, 6 S. 198.

(d) Per Lord Brougham in *M'Gregor v. Forrester*, 13 Apr. 1835, 1 S. & M'L. 458.

(e) *Lamington v. Moor*, 1675, M. 4252; *L. Tulliallan v. L. Clackmannan*, 1626, M. 4253; *Drunkilbo v. Lord Stormonth*, 1629, M. 4254; *Dickson v. Dickson*, 1780, M. 4269; *Hailes*, 865; *Porterfield v. Graham*, 1779, M. 4277, *affd.* 17 Mar. 1780.

The efficacy of words of express trust to restore the natural meaning of the word "liferent" in marriage settlements, depends upon the form in which the purpose of the trust is expressed. The interposition of a *continuing* trust in the liferenter (*a*) or others, is in most cases sufficient to preserve the contingent fee for unborn children, without the employment of the taxative word *allenerly* (*b*). We mean, if the settlement provides either expressly or by implication for the retention of the liferented funds in the hands of the trustees until the fee emerges; for if not, the rules of construction applicable to direct destinations will be followed.

Continuing Trust equivalent to words of express restriction.

It has been laid down, for instance, that by no latitude of construction can a simple direction to trustees to *pay* or *convey*, during the subsistence of the marriage, to a parent in liferent, and the children in fee, receive effect as a trust of the fee for the children. For, it is argued, the trustees are bound to execute a conveyance in the precise terms of the destination; and as soon as the fund has been transferred to the parent in terms of the destination, it becomes his own by virtue of the artificial rule of construction already adverted to (*c*). However, it was decided that a conveyance to trustees in implement of a marriage-contract obligation to *invest* money for behoof of a parent in liferent and children in fee, or to pay over the fund at the *dissolution* of the marriage, ought to be construed according to the intention, on the principle that would guide the Court in the construction of directions for the execution of deeds of entail (*d*). Besides, in the case of a direction to pay at the dissolution of a marriage when the beneficiaries are specifically ascertained, there does not seem to be any room for the application of the doctrine that a fee cannot remain *in pendente*.

Secus in the case of a Trust to pay.

Marriage-contract Cases.

(a) *Mein v. Taylor*, 23 Feb. 1830, 4 W. & S. 22.

(b) *Ramsay v. Beveridge*, 3 Mar. 1854, 16 D. 764; *Watson v. Watson*, 8 Mar. 1854, 16 D. 808; *Douglas v. Sharpe*, 9 Mar. 1811, Hume, 173; *Jameson v. Strachan*, 27 Jan. 1835, 13 S. 318; *Cameron v. Young*, 28 June 1837, 15 S. 1205; *Ewan v. Watt*, 10 July 1828, 6 S. 1125.

(c) *Hutton's Trs. v. Hutton*, 11 Feb. 1847, 9 D. 639; *M'Donald v.*

M'Lachlan, 14 Jan. 1831, 9 S. 269; *Ferguson's Trs. v. Hamilton*, 18 July 1860, 22 D. 1442.

(d) *Seton v. Seton's Crs.*, 1793, M. 1219; *Denniston v. Dalgliesh*, 23 Nov. 1838, 1 D. 69; and see *Ewan v. Watt*, 6 S. 1125; *Jameson v. Strachan*, 27 Jan. 1835, 13 S. 318; *Cameron v. Young*, 28 June 1837, 15 S. 1205; *Alexander v. Alexander*, 13 Dec. 1843, 12 D. 345.

*Ferguson's Trs.
v. Hamilton.*

One of the most recent decisions upon the effect of a liferent destination embodied in a trust deed, is that of *Ferguson's Trs. v. Hamilton* (a). One of the directions of the settlement was, "to pay to the persons after named and described respectively, the several sums after specified," at the first term after the elapse of twelve months from the testator's death. In the enumeration of beneficiaries following this direction, there occurred the following destination:—"To James Hamilton, tailor in Irvine, in liferent, and his children, equally among them, in fee, L.5000. To John Hamilton, baker in Irvine, in liferent, and his children, equally among them, in fee, L.20,000." The leading opinion, delivered by Lord Wood (b), and which contains an elaborate review of all the authorities bearing on the question, lends great weight to the conclusion, that the legacy bequeathed to the family of James Hamilton, who had no children when the succession opened, was payable directly and immediately to himself in fee. As to the other legacy, it was argued, that as John Hamilton had several children surviving the testator, the bequest to *his* family at least ought not to be construed on the same principles as a bequest to children *nascituri*. *Dykes v. Boyd*, and *Scott v. Napier* (c), established the principle that in the case of *any* of the children being mentioned *nominatim* in the settlement, their interest was sufficient to keep the fee distinct from the liferent. We confess we are unable to discover, in the opinions delivered in *Ferguson's* case, any valid reason for refusing to extend the benefit of this equitable principle to children in existence, although not mentioned *nominatim*. It does not appear to us that the mere omission of their names ought to invalidate a bequest to legatees otherwise sufficiently identified, and capable of acquiring a vested interest.

Implied Trusts
for the preservation of Life-
rent Interests.

The effect of a continuing trust in modifying the common law construction of destinations in liferent and fee, was also very carefully considered by the Second Division in *Ramsay v. Beveridge* (d). The settlor, by a deed of direct conveyance, gave all his property

(a) *Ferguson's Trs. v. Hamilton*, *supra*.

(b) 22 D. 1453.

(c) *Dykes v. Boyd*, 3 June 1813, F. C.; *Scott v. Napier*, 14 May 1827, 2 W. & S. 550, affg. 4 S. 454. In the

last-mentioned case the children were not named in the settlement; but the direction was to *hold*, not to *pay*.

(d) *Ramsay v. Beveridge*, 3 Mar. 1854, 16 D. 764.

to his two brothers and his sister in liferent, without taxative words, and to the children of the sister procreated, or to be procreated of her marriage, in fee; and he also appointed the liferenters or the survivor of them, whom failing, the fiars, to be his executors, under certain conditions and declarations, which virtually raised a continuing trust in the executors. One of the declared purposes was, that the annual rents and interest arising from his estate should be divided into three parts, and applied as above mentioned; provision being also made for the events of the survivance of any of the joint liferenters, for the management of the estate during the minority of the children, and, finally, for a division of the residue amongst the children, after the death of the longest liver of the liferenters. The Lord Ordinary held that, as the deed contained a direct conveyance to the disponees, without the use of words in the dispositive clause limiting their right to a fiduciary fee, they were entitled to the fee-simple estate under the terms of the destination. But the judges of the Second Division were clearly of opinion, that the declaration of trust embodied in the conveyance must receive effect as a qualification of the general words of disposition, and that, read in the light of the testator's intention, they imported a restriction of the interest of the disponees to a naked liferent. Referring to the terms of the declaration of trust ("that these presents are granted under the express conditions and declarations after written"), Lord Justice-Clerk Hope thought it was too clear for argument, that such a clause must qualify the right given *ex figura verborum* in the preceding words of conveyance; because, had the grant even been in the form of a fee, the fiar's interest might have been modified and defined to any conceivable extent by the declaratory clause (a). Lord Cottenham's dictum in the case of *Mackintosh v. Mackintosh* (b), to the effect that the word "allenary" was the only expression of intention by which a trust could be created in the nominal liferenter, was thought to be inconsistent with principle and with previous authorities; and it was justly observed by Lord Wood, that if the word "allenary" had sufficient force to restrict the parent's right to a liferent, it was impossible to hold that a clear declaration of intention should not have the same force, when

*Ramsay v.
Beveridge.*

(a) 16 D. 771.

(b) *Mackintosh v. Mackintosh*, 17 April 1845, 4 Bell, 124.

*Watson v.
Watson.*

introduced into the deed, as one of the conditions and burdens under which the conveyance was given (a). In a case decided very soon after, where a residue was left to the testator's daughters, under the declaration, that one-half of each share was vested absolutely, the other half "being left to each of them in liferent, and to their children in fee," but not to be payable till after the death of the testator's widow and the majority of the youngest daughter, the Court again gave effect to the apparent intention, and found that it was the duty of the trustees to retain the second half of the daughters' shares for the benefit of their children, on the ground, apparently, that the direction to pay over the one half of the provision implied that the other half was to be retained for the purpose of investment (b).

Quid juris,
when under a
Destination of
Liferent and
Fee, the Desti-
nation of the
Fee is after-
wards re-
voked?

In connection with this subject an important question has been lately mooted, namely, in the event of a life interest being given to a party with a destination over, if the testator revokes the destination over, does that revocation raise the life interest to a fee? We incline to give an affirmative answer as to cases where the life estate is described in popular language, *e.g.*, the *interest* of a certain sum, or the *use* of a subject (c). But the words "liferent" and "fee" being *voces signatae*, cannot be wrested from their natural meaning upon considerations of probable intention. In *Alves v. Alves* (d), the Court negatived a plea, that in giving a liferent of money with a general power of disposal, the settlor had intended to confer the fee; reserving the question as to the effect of such a settlement where there was *no destination over*. In *Sharpe v. Sharpe's Trs.* (e), the settlement was to a party in liferent, with a series of substitutions, which failing, to the settlor's nearest heirs and assignees whomsoever. The settlor having afterwards revoked the substitutions, Lord Jerviswoode held that the ultimate destination to *heirs* and *assignees* was a sufficient destination over to prevent the fee from vesting in the liferenter; though, it will be observed, the destination was to the same parties who might have claimed the resulting interest, had there been no disposal of the fee.

(a) 16 D. 799.

(d) *Alves v. Alves*, 8 Mar. 1861, 23

(b) *Watson v. Watson*, 8 Mar. 1854, D. 712.
16 D. 803.

(c) See remarks on *Sanderson v. Kerr*, *supra*, p. 140, and note.

(e) *Sharpe v. Sharpe's Trs.*, 18 Feb. 1862; *Belfrage v. Davidson's Trs.*, 7 Jan. 1862 (Lord Jerviswoode).

CHAPTER VIII.

OF THE LANGUAGE IN WHICH A TRUST MAY BE DECLARED BY IMPLICATION.

AN implied trust, as defined by Mr Lewin, is one declared by a party, not directly, but only by implication (a). Being created by the *declared* will of the party, it is distinguished from resulting trusts, which are the creature of *presumed* intention, and from constructive trusts, which originate in the act of the trustee. Accordingly, it has been laid down, that an intention manifested in favour of a party by one who possesses the power of disposing of his property, is sufficient to raise an implied trust, which it will be the duty of the Court to execute, although the language of the instrument may be exceptionable in point of formality (b).

Implied Trust
defined.

The principles which regulate the interpretation of this class of provisions were investigated by Lord Kames, in his *Principles of Equity* (c); and although, under the title of "Implied Will," the learned author appears to have directed his attention more especially to the subject of contracts, it is evident, from his illustrations as well as from the cases reported under this head in the Dictionary, that the doctrine of implied intention had, from an early period in the history of our law, held a recognised place in the interpretation of testamentary settlements.

Lord Kames'
doctrine.

In more recent times, the doctrines of implied or presumed intention have acquired a very important position in connection with the interpretation of informal testamentary writings. Words of implication may derive their significance, either (1) as determining the constitution of the trust itself, or (2) as indicative of the persons or objects intended to be benefited, or (3) as determining the property or subject of the trust conveyance.

How Words of
Implication to
be considered.

(a) Lewin, Tr., 4th Ed. 83. See also Ch. X. Sec. I. *infra*.

(b) See Lewin, Tr., 4th Ed. 100.

(c) Kames' Eq. (Ed. 1778), 238.

Declaratory
and Precatory
Trusts.

A trust is constituted by implication when the settlor, instead of declaring the purposes of the trust by words of explicit direction, employs expressions either importing a *wish* to carry the purpose into effect, or suggesting the purpose in the form of a *request* or recommendation to trustees, called a precatory trust (*a*). A "wish" is in law equivalent to a will; and therefore, although the testator may have given no directions for carrying his wish into practical execution, it will be binding upon the executors as trustees for the objects of the testator's bounty (*b*). It was at one time attempted to be maintained, that the execution of a trust expressed in the form of a request or recommendation to the donees was optional. But the Courts both in England and Scotland have laid down the rule, that *discretionary* powers, to be effectual, must be express (*c*); and therefore, where the intention of the settlor is expressed in words precatory or recommendatory, it will receive effect, not as a power, but as a trust, in the same way as if the direction had been imperative (*d*).

"Wish" equivalent to Will.

In the case of *Crichton v. Grierson* (*e*) it was laid down by Lord Lyndhurst, that the expression of a *wish* to benefit a particular class of persons was equivalent to a trust for their behoof; and an opinion was expressed by his Lordship, upon a review of the cases decided by the Court of Session, that the law of Scotland was more favourable to the constitution of trusts by implication than that of England (*f*). This precedent was followed in *Dundas v. Dundas* (*g*), and other cases decided by the Court of Session, and was reaffirmed by the Court of Appeal in the leading case of the *Magistrates of Dundee v. Morris* (*h*).

"Recommendation" equivalent to a Direction.

On similar principles, it was laid down by Lord Brougham in

(*a*) See Stair, 1, 12, 2.

(*b*) See *Mags. of Dundee v. Morris*, and other cases referred to in the next paragraph.

(*c*) See Chapter XXII. (Powers of Disposal, etc.).

(*d*) See Dig. Lib. 30, T. 1, 115, 118, where the expressions *cupio*, *opto*, *credo*, *desidero*—*uti des*, are declared to be equivalent to *exigo*, and to create a *fidei commissum*.

(*e*) *Crichton v. Grierson*, 25 July

1828, 3 W. & S. 329. See *Nasmyth v. Jaffray*, 1662, M. 5483, the earliest reported case on Implied Trust.

(*f*) 3 W. & S. 343.

(*g*) *Dundas v. Dundas*, 27 Jan. 1837, 15 S. 427; *Turnbull v. Doods*, 29 Feb. 1844, 6 D. 896; *Alexander v. Gordon*, 13 Dec. 1849, 12 D. 345.

(*h*) *Mags. of Dundee v. Morris*, 1 May 1858, 3 Macq. 134, reversg. 19 D. 918. See *Wylie v. Enohin*, 29 L. J. Ch. 341; affd. 3 April 1861.

Miller v. Black's Trs. (a), that a *recommendation* to trustees to execute a conveyance of the residue of his estate to themselves, and to apply the annual proceeds to certain charitable *uses*, was equivalent to a direction. *A fortiori*, words necessary to complete the sense of a trust purpose may be supplied by implication (b). But a recommendation to execute a *power* is not imperative.

The doctrine of the constitution of trust purposes by implication has been more fully elaborated in England than in the decisions of our own Courts, in consequence of the great variety of cases which have been presented for judicial determination in the Court of Chancery. It would encroach too largely on the space at our disposal were we to attempt an analysis of the English decisions on implied and precatory trusts; and we shall therefore conclude this part of the subject by extracting the following summary of their import from Mr Lewin's work:—"If," he says, the testator "'desire' (c), 'will' (d), 'request' (e), 'will and desire' (f), 'wish and request' (g), 'wish and desire' (h), 'entreat' (i), 'most heartily beseech' (k), 'order and direct' (l), 'authorize and empower' (m), 'recommend' (n),

Doctrine of the
Court of Chan-
cery.

(a) *Miller v. Black's Trs.*, 14 July 1837, 2 Shaw & M'Lean, 866, affg. 14 S. 557.

(b) *Mags. of Edin. v. Univ. of Edin.*, 20 June 1831, 13 D. 1187; *Carsewell v. Carsewell*, 9 Feb. 1858, 20 D. 516; *Neilson v. Stewart*, 3 Feb. 1860, 22 D. 646; *Mags. of Dundee v. Morris*, *supra*.

(c) *Harding v. Glyn*, 1 Atk. 469; *Mason v. Limburg*, cited *Vernon v. Vernon*, Amb. 4; *Trot v. Vernon*, 8 Vin. 72; *Pushman v. Filliter*, 3 Ves. 7; *Brest v. Offley*, 1 Ch. Rep. 246; *Cary v. Cary*, 2 Sch. & Lef. 189; *Cruwys v. Colman*, 9 Ves. 319; and see *Shaw v. Lawless*, L. & G. 154; S. C., 5 Cl. & Fin. 129; S. C., Ll. & G. *temp.* Plunkett, 559.

(d) *Eales v. England*, Pr. Ch. 200; *Cloudsly v. Pelham*, 1 Vern. 411.

(e) *Pierson v. Garnet*, 2 B. C. C. 38; S. C. affirmed, id. 226; *Eade v. Eade*, 5 Mad. 118; *Moriarty v. Martin*, 3 Ir. Ch. Rep. 26; *Bernard v. Minshall*, 1 Johns. 276.

(f) *Birch v. Wade*, 3 V. & B. 198; *Forbes v. Ball*, 3 Mer. 437.

(g) *Foley v. Parry*, 5 Sim. 138; affirmed 2 M. & K. 138.

(h) *Liddard v. Liddard*, 6 Jur. N. S. 439.

(i) *Prevost v. Clarke*, 2 Mad. 458; *Meredith v. Heneage*, 1 Sim. 553, 555, per Chief Baron Wood; and see *Taylor v. George*, 2 V. & B. 378.

(k) *Meredith v. Heneage*, 1 Sim. 553, per Chief Baron Wood.

(l) *Cary v. Cary*, 2 Sch. & Lef. 189; *White v. Briggs*, 2 Phill. 583.

(m) *Broun v. Higgs*, 4 Ves. 708, 5 id. 495; affirmed 8 Ves. 561; and in D. P. 18 Ves. 192.

(n) *Tibbitts v. Tibbitts*, Jac. 317; S. C. affirmed, 19 Ves. 656; *Horwood v. West*, 1 S. & S. 387; *Paul v. Compton*, 8 Ves. 380, per Lord Eldon; *Malim v. Keighley*, 2 Ves. jun. 333; S. C. ib. 529; *Malim v. Barker*, 3 Ves. 150; *Meredith v. Heneage*, 1 Sim. 553, per Chief Baron Wood; *Kingston v. Lorton*, 2 Hog. 166; *Cholmondeley v.*

'hope' (a), 'do not doubt' (b), 'be well assured' (c), 'confide' (d), 'have the fullest confidence' (e), 'trust and confide' (f), 'have full assurance and confident hope' (g), 'under the firm conviction' (h), 'well know' (i), or use such expressions as 'of course the legatee will give' (k), 'in consideration the legatee has promised to give' (l), etc.,—in these and similar cases the intention of the testator is considered imperative, and the devisee or legatee is bound, and may be compelled, to give effect to the injunction. And though instances of this kind generally occur upon the construction of wills, the doctrine does not apply to wills exclusively (m), but has been extended to settlements *inter vivos*" (n).

No Implied
Trust where
purpose is un-
certain.

The principle is well established, that a legacy or testamentary purpose may be void by reason of uncertainty (o); but the instances in which effect has been given to this plea are not numerous. It was laid down by Lord Alvanley in an early case (p), that a trust is implied wherever a testator points out the objects, the property, and the way in which it shall go; and it has since been held that uncertainty, when pleaded to the effect of creating a lapse, must attach either to the objects of the bequest, or to the

Cholmondeley, 14 Sim. 590; *Hart v. Tribe*, 18 Beav. 215; and see *Meggison v. Moore*, 2 Ves. jun. 630; *Sale v. Moore*, 1 Sim. 534; *Ex parte Payne*, 2 Y. & C. 636; *Randal v. Hearle*, 1 Anst. 124; *Lefroy v. Flood*, 4 Ir. Ch. Rep. 1. As to *Cunliffe v. Cunliffe* (Amb. 686), see *Pierson v. Garnet*, 2 B. C. C. 46; *Malim v. Keighley*, 2 Ves. jun. 532; *Pushman v. Filliter*, 3 Ves. 9.

(a) *Harland v. Trigg*, 1 B. C. C. 142; and see *Paul v. Compton*, 8 Ves. 380.

(b) *Parsons v. Baker*, 18 Ves. 476; *Taylor v. George*, 2 V. & B. 378; *Malone v. O'Connor*, Ll. & G. temp. Plunket, 465; and see *Sale v. Moore*, 1 Sim. 534.

(c) *Macey v. Shurmer*, 1 Atk. 389; S. C. Amb. 520. See *Ray v. Adams*, 3 M. and K. 237.

(d) *Griffiths v. Evans*, 5 Beav. 241.

(e) See *Wright v. Atkyns*, 17 Ves. 255, 19 Ves. 299, G. Coop. 111, T. &

R. 143; *Webb v. Wools*, 2 Sim. N. S. 267; *Palmer v. Simmonds*, 2 Drew. 225.

(f) *Wood v. Cox*, 1 Keen. 317; S. C. 2 M. & C. 684; *Pilkington v. Boughey*, 12 Sim. 114.

(g) *Macnab v. Whitbread*, 17 Beav. 299.

(h) *Barnes v. Grant*, 2 Jur. N. S. 1127.

(i) *Bardswell v. Bardswell*, 9 Sim. 323; *Nowlan v. Nelligan*, 1 B. C. C. 489; *Briggs v. Penny*, 3 Mac. & Gord. 546, 3 De G. & Sm. 525.

(k) *Robinson v. Smith*, 6 Mad. 194; but see *Lechmere v. Lavie*, 2 M. & K. 197.

(l) *Clifton v. Lombe*, Amb. 519.

(m) *Liddard v. Liddard*, *supra*.

(n) *Lewin, Tr.*, 4th Ed. 101.

(o) *Bell's Prin.* § 1884; and see opinion of Lord Chelmsford, Ch., in *Mags. of Dundee v. Morris*, 3 Macq. 153.

(p) *Malim v. Keighley*, 2 Ves. jun. 335.

property intended to be bequeathed. In *Ewen v. the Magistrates of Montrose* (a), Lord Wynford refused effect to a bequest of residue, to be accumulated "until the principal sums and accumulated interests shall amount to the sum of L. . . . sterling," for the establishment of an hospital for the maintenance, clothing, and education of boys. But the authority of this case was disputed by the law Lords who decided the case of *Morris* (b); and on principle it would seem that a destination of *residue* is a sufficient designation of the subject; the extent to which accumulation may take place, as well as the number of the recipients of the testator's bounty, being matters of expediency, which in the case of a charitable foundation may fairly be supposed to be left to the discretion of the trustees.

The objects of the trust have not been considered uncertain where a legacy has been given to charities in a certain town (c). A bequest for payment of twenty shillings in the pound to the truster's creditors, "as the same shall be set forth in a list which I intend to leave," was sustained, although no list was left; and extrinsic evidence was admitted to determine the persons entitled to payment (d). And where a testator bequeathed legacies "to each of the daughters procreate of the marriage betwixt A. B. and C. D., L.400 sterling L.1200," and there were four daughters of the marriage, it was ruled that the insertion of a total corresponding to three legacies of L.400, did not defeat the intention; and accordingly each of the four daughters were found entitled to a legacy of L.400 (e).

Uncertainty as to the person or object to be benefited.

Bequests to trustees to be divided "equally amongst relations not herein named"; to any of the truster's "blood relations" that the disponent should think the most fit (f); to such of the truster's "mother's relations" as his trustee should appoint (g);

"Friends and Relations."

(a) *Ewen v. Mags. of Montrose*, 16 Nov. 1830, 4 W. & S. 346.

(b) 3 Macq. 154.

(c) *Hill v. Burns*, 14 April 1826, 2 W. & S. 80; *Jack v. Burnett*, 28 Aug. 1846, 5 Bell, 409; *Boe v. Anderson* (first point), 11 Nov. 1857, 20 D. 11.

(d) *Sprot v. Pennycook*, 12 June 1855, 17 D. 840.

(e) *Maclehose v. Bogles*, 28 Feb. 1815, F. C. See *Anderson v. Anderson*, 18 July 1729, 1 Paton, 136, revg. M. 6590; and *Stewart v. Stewart*, 26 Nov. 1813, F. C.

(f) *Wharrie v. Wharrie*, 1760, M. 6599; *Murray v. Fleming*, 1729, M. 4075.

(g) *Snodgrass v. Buchanan*, 1806, M. App. Service of Heirs, No. 1.

to such of the trustor's "friends or relations" as may be pointed out by his wife, with the approbation of the majority of trustees (*a*); to the trustor's "poorest friends and relations, whom he might have forgot" (*b*); and to "poor descendants" (*c*)—have been sustained as implied trusts to be executed at the discretion of the dispositive for the benefit of persons of the class designated by the trustor. But a destination to descendants to be selected at the discretion of the trustees, will necessarily fail by their declination of the trust (*d*); because here the power of selection is essential to the execution, and not merely incidental, as in the case of a charity. A trust in favour of "relations" to be selected by the trustees includes relations by the mother's as well as the father's side (*e*); and the principle has been extended to the case of an unconditional bequest to "nearest relations" so as to include the children of a sister-uterine, who was named in other parts of the settlement along with the grantor's brother-german (*f*). A declaration that a fund is "to be divided equally," has been held equivalent to a bequest to the next of kin in equal shares (*g*). But in a recent case, where a trust was created to "divide" a portion of the estate "among my relations in such portions as my trustees may think proper, or as I may direct," and the surviving trustee executed a deed of distribution assigning a large portion of the estate to distant relatives, and a smaller share to the testator's next of kin, the Court sustained the execution of the power, being unanimously of opinion that the word "relations" comprehended all who could show a traceable relationship to the testator (*h*).

Error in Designation of Beneficiary.

Wherever a radical uncertainty exists respecting the person intended to be benefited, as where the name of the legatee has

(*a*) *Crichton v. Grierson*, 25 July 1828, 3 W. & S. 338.

(*b*) *Broun's Trs. v. His Relations*, 1762, M. 2318.

(*c*) *Cairnie v. Cairnie's Trs.*, 14 Nov. 1837, 16 S. 1; *Macnair v. Macnair*, 1791, M. 16210; and see *Thomson v. Cumberland*, 16 Nov. 1814, F. C.

(*d*) *Dick v. Ferguson*, 1758, M. 16206 and 7446; and see *Hamilton v. Whitehead*, 22 Jan. 1833, 11 S. 302.

(*e*) *Broun's Trs. v. His Relations*, 1762, M. 2318.

(*f*) *Scott v. Scott*, 10 May 1855, 2 Macq. 281, aff. 14 D. 1057; and see *Norris v. Norris*, 11 Dec. 1838, 2 D. 220.

(*g*) *Dundas v. Dundas*, 27 Jan. 1837, 15 S. 427.

(*h*) *McCormack v. Barber*, 25 Jan. 1861, 22 D. 398. In England, trusts have failed for want of certainty in the object, where the estate was given to A. "with a hope that he would continue it in the family" (*Harland v. Trigg*, 1 B. C. C. 142); or on trust for

been omitted by inadvertence or erased (a), or a wrong name inserted (b), the Court will not allow the defect to be supplied by extrinsic evidence. However, a slight error in the name of the beneficiary (c), or of a society (d), will not invalidate a bequest *dummodo constat de persona*.

Uncertainty in respect of the property intended to be bound is not easily assumed in the case of a charitable bequest; because the extent of the fund which may be needed to carry out the testator's benevolent intention, is not regarded as a matter for arbitrary determination, but is supposed to be capable of exact ascertainment (e). Accordingly, where a testator left a memorandum expressive of his wish to establish an hospital in his native town for 100 boys, the House of Lords remitted to the Court of Session to frame a scheme of endowment, and for the purpose of "inquiring into and ascertaining the amount of the estate of the said testator necessary for carrying into effect such scheme" (f). Where the execution of a trust has been committed to the trustees of the general estate, the Courts have usually held that the intention was to apply the whole residue to the purposes of the charity, unless the testator appeared to have contemplated the possibility of a surplus (g). Questions as to uncertainty in regard to property bequeathed to individual legatees, relate more frequently to the extent of the legacy than to its validity. Thus a declaration by spouses, that "the longest liver is to have all that remains after our debts

Uncertainty as to the subject of Conveyance.

distribution "amongst such members of A.'s family" as might be thought most deserving (*Green v. Marsden*, 1 Drew, 646); or "to such of the heirs of the testator's father as she might think best deserved a preference" (*Meredith v. Heneage*, 1 Sim. 542, etc.).

(a) *Grant v. Shepherd*, 21 July 1847, 6 Bell, 153.

(b) *Reid v. Kedder*, 24 June 1834, 12 S. 781; *Blair v. Blair*, 16 Nov. 1849, 12 D. 97.

(c) *Wedderspoon v. Thomson's Trs.*, 15 Dec. 1824, 3 S. 279; *Keiller v. Keiller*, 16 June 1826, 4 S. 730.

(d) *Synod of Aberdeen v. Milne's Trs.*, 25 Feb. 1847, 9 D. 745; *Scottish Missy. Socy. v. Home Mission Commit-*

tee, 19 Feb. 1858, 20 D. 634; *Pringle v. M. of Tweeddale*, 16 Dec. 1823, 2 S. 588; *Sommervail v. Edin. Bible Soc.*, 22 Jan. 1830, 8 S. 370; *Duff's Trs. v. Mayor of London*, 18 Mar. 1862.

(e) Per Lords Cranworth and Wensleydale, 3 Macq. 166, 175.

(f) *Mags. of Dundee v. Morris*; see judgment 3 Macq. 178.

(g) *Miller v. Black's Trs.*, 14 July 1837, 2 S. & M'L. 866, affg. 14 S. 557; *Thomson's Trs. v. Alexander*, 4 Mar. 1852, 1 Stewart, 558; *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 914; and see *Hosp. of Perth*, 1795, M. 5758, Bell's fol. Ca. 173; *Ramsay v. College of St Andrews*, 7 June 1842, 6 D. 896.

are paid," has been sustained as a valid universal legacy of moveable estate (a); while a bequest of "all moveables whatsoever," following an enumeration of corporeal moveables, was held, as we have seen in treating of express trusts, not to comprehend *nomina debitorum* (b). A conveyance of certain specified heritable subjects, together with "all other lands or heritable estate of every description," for behoof of the granter's children "exclusive always of any son who may succeed as heir of entail in the estate of Rickarton," was found not to carry that entailed estate, on the assumption that the entail was defective in its prohibitions; as there was no evidence of an intention to deal with it as fee-simple estate (c).

Whether a Recital can receive effect as a Trust.

A mere recital that the trustor has already bequeathed a certain legacy to a beneficiary, when introductory to a destination of residue, may receive effect as an implied trust of a sum equal to the legacy, although there is no other evidence of a previous bequest; as where a testator, on the recital that "by my deed of settlement I bequeathed to my nephew, John Grant, a sum of money considered equal to the value of the heritable property left to his brother, Alexander Grant [which was a mistake], and also the free residue of my estate," recalled the bequest of residue, and appointed the residue to be divided between the brothers. The Court determined that John Grant was a general legatee for a sum equal to the value of the heritable estate (d). On the other hand, it is clear that a precatory direction to a donee or legatee to dispose of the property in a particular way after the grantee's death, is not binding, unless the grantee's right be expressly limited to a life interest (e); for if otherwise, the request is, on the most liberal construction, no more than a simple destination, which is defeasible at pleasure. And it may be laid down upon English authority, which on this point is in har-

(a) *M'Millan v. M'Millan*, 28 Nov. 1850, 13 D. 187.

(b) *Dunbar's Trs. v. Dunbar*, 15 Jan. 1808, Hume 207.

(c) *Hepburn v. Hepburn*, 10 Feb. 1860, 22 D. 780. It has been held that recommendations to consider certain persons (*Sale v. Moore*, 1 Sim. 534); to be kind to them (*Buggins v. Yates*, 9 Mod. 123); to remember them (*Bardswell v. Bardswell*, 9 Sim. 319);

to do justice to them (*Le Maistre v. Bannister*, Pr. Ch. 200), or to make ample provision for them (*Winch v. Britton*, 14 Sim. 379), and trusts of that nature, are void for uncertainty.

(d) *Grant v. Grant*, 1 Mar. 1851, 13 D. 805.

(e) *Murray v. Fleming*, 1729, M. 4075; *Ramsay v. Beveridge*, 3 Mar. 1854, 16 D. 764.

mony with the principles of our law (*a*), that the Court will not rear up an implied trust for the purpose of carrying out a purpose of substitution. Waiving the consideration of expressions of a mere intention to benefit descendants, it will be seen that even a positive recommendation to divide property among certain persons in specified proportions (*b*), or to divide and dispose of what money or property the grantee might have saved from the yearly income thereby given to him (*c*), or to leave the bulk of the residuary estate in a certain way (*d*), will not be binding on the grantee, if he has the power expressly or impliedly given to him of disposing of the subject in his lifetime (*e*).

If the words of bequest amount to a partial trust for purposes which do not exhaust the estate, the residue will result to the next of kin (*f*). The Court does not easily infer a residuary interest in persons described as trustees; and accordingly a fund given in life-rent to a beneficiary, the capital being "payable to the trustees," was held to merge in the general estate (*g*). But a general devise of property to a party and his heirs "for his and their own use and benefit," subject to payment of legacies, was held by Lord Cottenham, reversing the decision of Lord Langdale, M. R., to give a beneficial interest in the residue (*h*); and this decision may safely be regarded as a precedent in Scotland (*i*).

Resulting Interests in Implied Trusts.

It has been observed, that the question whether a testamentary purpose is to be interpreted as a trust or a power, is one of intention

Whether a purpose is discretionary or imperative.

(*a*) *Greig v. Johnston*, 6 W. & S. 426, per Lord Wynford; *Brown v. Coventry*, 1792, M. 14863; and cases cited in Bell's Pr. § 1878.

(*b*) *White v. Briggs*, 15 Sim. 33; 15 L. J. Ch. Ca. 182. Lord Lyndhurst observed that the word "recommend" had been repeatedly held to create a trust; but that construction frequently defeated the intention of the testator, and the Court was unwilling to extend the doctrine.

(*c*) *Cowman v. Harrison*, 10 Hare, 234. "The right of a donee to spend the subject-matter of the gift is inconsistent with the nature of a trust; and the Court therefore collects in that case that there can be no intention to impose a trust." Per Turner, V.C., p. 239.

(*d*) *Pulton v. Simmonds*, 2 Drew, 221.

(*e*) *Knight v. Boughton*, 11 Cl. & Fin. 513; *Huskinson v. Bridge*, 4 De Gex & Sm. 245. But see *contra*, *Malim v. Keighley*, 2 Ves. jun. 529; *Harwood v. West*, 1 S. & S. 387.

(*f*) *Mags. of Dundee v. Morris*, 3 M'Q. 175; and sequel, 23 D. 493. But if the heirs are expressly excluded, the whole fund must be applied to the purposes of the bequest; *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 914. See Chapter X. (Resulting Trusts).

(*g*) *Miller v. Black's Trs.*, 14 July 1837, 2 S. & M'L. 866.

(*h*) *Wood v. Cox*, 2 M. & C. 684, 6 L. J. Ch. Ca. 366.

(*i*) *Jack v. Burnett*, 5 Bell, 409.

rather than of grammatical import (a). Where a direction to dispose is a mere adjunct to a bequest of the beneficial interest in a subject, the presumption is, as we have seen, for an absolute gift of the fee, or at least of the usufructuary interest, coupled with a power of defeating the destination. But where the fee is vested in trustees for the use of the beneficiary, it would seem that any suggestions addressed to the trustees regarding its ultimate disposal are to be regarded as directions in the nature of a precatory trust, which they are not at liberty to disregard (b). For example, a power of altering the settlement can be exercised only for the purpose of aiding the settlor's intention, and not for defeating it (c). The beneficiary for whose behoof a power of appointment has been granted, may require the trustee to execute it (d). The Court will, if needful, define or extend the powers of the trustees (e), or will restrict the interest of the appointee where the trustees have exceeded their powers (f), though it does not appear that the Court has ever taken upon itself the execution of a power coupled with a trust (g).

Implied Trust
by way of bur-
den or reserva-
tion.

The principle that an intention manifested by a disponent is equivalent to a trust, may be further illustrated by reference to the case of a direction, in a deed of absolute conveyance, to apply the proceeds of realized heritable property in payment of legacies (h); or of a conveyance to a party in liferent giving a nominal fee, subject to the condition that such fee shall be retained for the benefit of children of the marriage (i); to the case of dispositions of heritage charged with payment of debts and legacies (k), or of

(a) See *Malim v. Keighley*, 2 Ves. jun. 531; *Meggison v. Moore*, 2 Ves. jun. 632, per Lord Loughborough.

(b) See *Watson v. Watson*, 8 Mar. 1854, 16 D. 803, and *Dennistown v. Dalgleish*, 22 Nov. 1838, 1 D. 69, where directions to pay to certain parties in liferent, and to their children in fee, were interpreted as trusts to invest for their behoof.

(c) *Douglas v. Douglas' Trs.*, 30 June 1859, 21 D. 1066.

(d) *Cowan v. Crawford*, 20 Jan. 1837, 15 S. 398; *Campbell v. Campbell*, 25 Feb. 1809, F. C.

(e) *Stewart v. Stewart*, 26 Nov.

1813, F. C.; *Macdonald's Trs. v. Muir*, 9 Dec. 1851, 14 D. 152.

(f) *Strathallan v. D. of Northumberland*, 20 May 1840, 2 D. 840; *E. of Rothes v. Rothes*, 21 Jan. 1823, 2 S. 135; *E. of Mar v. Lady Erskine*, 3 Dec. 1830, 9 S. 126.

(g) See Chapter XXII. (Powers of Disposal, etc.).

(h) *Fergus v. Fergus*, 7 Feb. 1833, 11 S. 362.

(i) *Ramsay v. Beveridge*, 3 Mar. 1854, 16 D. 764.

(k) *Stair*, 3, 5, 17; *Ersk.* 3, 8, 52; *Bell's Prin.* § 1395; *Robertson's Crs. v. Robertson*, 13 Dec. 1803, M. App.

specific provisions (a) ; in which cases a trust for payment is raised by implication in the person of the disponent as the condition upon which the grant is to take effect in his favour. So also, if a husband has bound himself by his marriage-contract to lay out and secure a sum of money as a provision to his wife, he is, on the principle of implied trust, responsible for its investment, and can only discharge himself of the trust by investing the sum on good heritable security (b).

Competition, No. 2 ; *Wemyss v. Trail*, 23 Nov. 1810, F. C. ; *Ogilvie v. Dundas*, 22 May 1826, 2 W. & S. 214 ; *Sinclair v. Fraser*, 1798, Hume, 176 ; *Moncrieff v. Skene*, 29 June 1825, 1 W. & S. 672.

(a) *Johnston v. Cochran*, 13 Jan. 1829, 7 S. 226.

(b) *Lindsay v. Lothian*, 1685, M. 2269 ; *Hay v. Hay*, 1710, M. 12982 ; *Ramsay v. Cowan*, 11 July 1833, 11 S. 967.

CHAPTER IX.

OF THE INTERPRETATION OF TRUSTS AS AFFECTED BY FOREIGN LAW, AND OF JURISDICTION (a).

Jurisdiction of
the Court of
Session in
Trusts.

THE enforcement of trusts engrafted upon foreign property has given rise to many questions of difficulty, involving not only the

(a) On the subject of private international law, in so far as applicable to questions of testate succession, the reader is referred to the following, which are selected as being probably the most authoritative among the numerous treatises, ancient and modern, which have been published on the subject:—Phillimore, *Intern. Law*, Vol. IV. Ch. 43 (see abstract, *infra*); Burge, *Com. Vol. IV. Ch. 12*, which contains a careful abstract of the case law of the foreign and colonial courts on the subject; Foelix, *Ed. Demangeat*, Vol. I., p. 239, where the opinions of the publicists are ably epitomized; Westlake, Ch. 10, a good paraphrase of the 12th Vol. of Savigny's *Romischen Rechts*; Story, *Confl. Ch. 11*; Voet, *ad Pand. Lib. I. tit. 4, par. 2, de Stat.*; Huber, *ad Pand., Lib. I. tit. 3, App. de Confl.*; and, among our own writers, Ersk. 3, 2, 39; Kames, *Eq. Book III. Ch. 8*; Robertson, *Pers. Suc. Ch. 8*.

The following statement, the materials of which are drawn chiefly from Dr Phillimore's treatise on International Law (IV. c. 43), will, we believe, be found to present an accurate view of the doctrines of the Publicists, as

applicable to the interpretation of testamentary instruments, and may serve as a criterion for testing the doctrines of the law of Scotland as stated in the text.

1. The first question is, What is the forum entitled to exercise jurisdiction over the whole question of the succession? The answer is, that, as a general rule, the *petitio hæreditatis* should be in the forum to which the heir or representative of the deceased is subject; though the *petitio rerum singularum*,—*e.g.*, for confirmation or probate with a view to the establishment of a title to particular subjects,—may perhaps necessarily be brought before the forum *rei sitæ*.

2. By what law shall the forum entitled to exercise jurisdiction decide the questions as to the form of the testamentary instrument, and the capacity of the testator? It would appear that the law of the domicile of the testator at the time of making his testament governs the question of his legal capacity to execute; but as to the validity of the testament, in so far as depending on formalities of authentication, the general opinion of jurists allows an option to the testator to adopt either the form required by the

element of jurisdiction, but also the construction of the provisions of such trusts, which is to a certain extent affected by the system of jurisprudence in force in the country in which the trust is to be administered. In the determination of questions of succession, the Court of Session exercises jurisdiction either *in rem* or *in personam*. If the subject of the trust be heritable property in Scotland, that will of itself give the Courts of Scotland jurisdiction *in rem*; and

lex loci actus or the form required by the *lex domicilii*, the adoption of either form being but *facultative*, not imperative; and if a testator authenticate his testament according to the law of his actual domicile, and his domicile is afterwards changed, such change will not, according to the best opinion of jurists, invalidate the instrument, though Savigny treats the point as doubtful (VIII. § 381), and John Voet maintains that the will would be invalidated (Voet, ad Pand. Lib. 38, tit. 3; tit. 2, § 12).

3. As to the validity of the dispositions contained in the testamentary writing, and the construction and interpretation of the language used by the testator, it must be admitted that, according to the general opinion of jurists, subject however to the qualification afterwards stated (*infra*, p. 172), the law of the testator's domicile furnishes the rule of interpretation. But we are not prepared to say that the decisions of the Scotch Courts, according to which certain words of disposition are essential to the validity of a conveyance of Scotch heritage (although possibly not essential according to the law of the settlor's domicile), are not capable of being supported on the principles laid down by the international jurists.

4. The particular class or description of persons entitled to take under a general *designatio personarum*, ought, on principle, to be left to the determination of the same law which regulates the interpretation of the deed; that is, in the case of personal property, to the

law of the domicile. As regards real property, there is a division of opinion as to whether the *lex domicilii* or the *lex rei sitæ* should prevail.

5. Legacies are held to be payable in the currency of the country in which the testator is domiciled, unless the testamant affords clear evidence that the testator meant another currency. And the rule is not varied by the circumstance that the legacy is to be paid out of real property situated where the currency differs from that of the testator's domicile.

6. According to the English rule, legacies and shares of succession bearing interest, carry the interest of the state in which the assets have been placed by the executors or administrators since they became payable. This would also appear to be the doctrine of the law of Scotland.

7. With respect to the law which ought to regulate the payment of duties to Government on testaments and successions, the Legislature of Great Britain imposes duties on probate or administration (in which category, inventory duty is included), and duties on legacies or shares. The former are payable according to the *lex loci* of the assets at the death of the settlor or intestate; the latter are payable according to the law of the domicile, and into the exchequer of the country where the deceased person was domiciled, wherever the legatees or successors reside. This point was decided by the House of Lords in a Scotch case (*Thomson v. Advocate-Gen.*, 18 Feb. 1845, 4 Bell 1, reversing 3 D. 1301 & Exch. Rep.)

even with respect to moveable property, it would seem that the confirmation of executors in Scotland to personal estate situated there, is sufficient to found jurisdiction, so as to give a right of action against the executors, notwithstanding their absence from the Scotch territory at the institution of the action (a).

Administration
of Personal
Property.

As regards the administration of settlements of personal property, wherever situated, there can be no doubt that the Court of Session has jurisdiction *in personam* to enforce the administration of the trust, provided the trustee is within the territory, and that the assistance of the Court is invoked in an action at the instance of

Administration
of Trusts of
Lands.

some party having an interest (b). The Court of Session also claims the right of enforcing the administration of trusts of foreign lands, if the trustees are, by residence or otherwise, subject to its personal jurisdiction (c); though here its jurisdiction is liable to be frustrated by the action of the judicatory of the country in which the lands

Interpretation.

are situated. The interpretation of the trust conveyance is, in the case of moveable property, determinable by the *lex loci contractus vel domicilii* (d), and in the case of heritage, by the *lex loci rei sitæ*. These are the general principles upon which the Court of Session, administering public law as it always does in questions involving jurisdiction, has entertained proceedings relative to the execution of trusts of property situated in other territories; and although, in the application of those principles to individual cases, differences of opinion have arisen amongst individual judges, the decisions of the Court have not, so far as we are aware, in any instance, been brought into direct conflict with those of competing jurisdictions.

Jurisdiction
by reason of
residence.

The jurisdiction of the Court of Session over the person of a trustee, executor, or residuary legatee resident in Scotland, is precisely analogous in its origin and effect to that which is exercised over any other debtor (e).

Ascertainment
of Foreign
Law

If the action is founded upon a foreign settlement, the Court will,

(a) *M'Morine v. Cowie*, 16 Jan. 1845, 7 D. 270; *Mags. of Wick v. Forbes*, 11 Dec. 1849, 12 D. 299.

(b) *Robertson v. Landell*, 2 Dec. 1843, 6 D. 170; *Cruickshank v. Cruickshank's Tr.*, 24 Feb. 1843, 5 D. 733.

(c) *Cruickshank v. Cruickshank's Tr.*, *supra*; *Ferguson v. Marjori-*

banks, 1 April 1853, 15 D. 637; *Thomson's Trs. v. Alexander*, 18 Dec. 1851, 14 D. 217.

(d) See p. 172, *et seq.*, *infra*.

(e) *Boe v. Anderson*, 11 Nov. 1857, 20 D. 11; *Ferrie v. Woodward*, 30 June 1831, 9 S. 854. See *Robertson v. Macvean*, 18 Feb. 1817, F. C. note.

of course, in the matter of interpretation, be guided by the opinion of foreign counsel, obtained on a remit by themselves (*a*); and they will not hold themselves bound by the decision of the Court of the *locus executionis* in another action (*b*). But where the opinion of counsel, in answer to a query, was to the effect that "the import or construction of the will is not purely or exclusively a question of English law; that it does not depend on any technical rule of English practice, but that it is a question on which the judge of any Court conversant with the language in which the will is written is entitled and bound to give his judgment, according to his understanding, and the plain interpretation of the words used;" the Court, by a majority of the whole judges, adopted the opinion in so far only as it affirmed the validity of the will, and rejected the opinion as regarded the construction put upon its provisions (*c*).

The determination of matters of foreign law has been put upon a new footing by two Acts of the present reign (*d*). The earlier statute provides for the ascertainment of the law of one part of her Majesty's dominions when pleaded in another part; and by the recent statute similar relations are established between the Superior Courts (*e*) of her Majesty's dominions and those of "any foreign country or state, with the government of which her Majesty may be pleased to enter into a convention" for that purpose.

Law Ascertainment Acts.

The first branch of section 1 of the original Act (*f*) empowers any of her Majesty's Superior Courts to adjust or approve of a case setting forth the facts in the cause, as these may be ascertained by verdict or agreement; and thereupon to adjust such questions of law, arising out of the same, on which they may desire to have the opinion of the foreign Court, for the purpose of remitting the same

Terms of the Enactments.

(*a*) *Wightman v. Delisle's Tr.*, 1802, M. 4479; *Newlands v. Chalmers' Tr.*, 22 Nov. 1832, 11 S. 65; *Hardman v. Rouget's Trs.*, 9 July 1842, 4 D. 1505; *Macpherson v. Tytler*, 19 Jan. 1850, 12 D. 486; *Gowan v. Bradley*, 14 Feb. 1845, 7 D. 433.

(*b*) *Baird v. Mitchell*, 14 July 1854, 16 D. 1088; *Boe v. Anderson*, 11 Nov. 1857, 20 D. 11; and see *Robertson v. Landell*, 6 D. 170.

(*c*) *Thomson's Trs. v. Alexander*, 18

Dec. 1851, 14 D. 217; see also *Trotter v. Trotters*, 10 June 1829, 3 W. & S. 407, affg. 5 S. 78; *Cranstoun v. Cunningham*, 16 Feb. 1839, 1 D. 521; *Gowan v. Bradley*, 14 Feb. 1845, 7 D. 433.

(*d*) 22 & 23 Vict. cap. 63; 24 & 25 Vict. cap. 11.

(*e*) Defined in § 4.

(*f*) Extended by § 1 of 24 & 25 Vict. cap. 11.

to the foreign Court for its opinion. Under this section (a) provision is also made for submitting cases received from foreign Courts to the Court of the country whose opinion is desired. The application is to be by petition, which may be disposed of either with or without argument (b). Section 3 (c) prescribes the method of having the opinion of the foreign tribunal applied to the case. If the remit has been made before answer, the Court may direct the opinion to be laid before a jury along with the other evidence. If dissatisfied with the opinion, the Court may again remit, with explanations, to the same, or to another superior Court.

"Election,"
and "Appro-
bate and Re-
probate."

To proceed with the principles of interpretation of foreign settlements, the Court of Session, in construing a total settlement, will apply the doctrine of approbate and reprobate to support ineffectual conveyances of lands in England; and in like manner the English principle of "election" is by the Court of Chancery made operative upon devises of Scotch property; the right of both Courts to do so being mutually acknowledged.

Dundas v.
Dundas.

In the case of *Dundas v. Dundas* (d), a settlor had included in his trust disposition an English estate of considerable value; but according to the law of England the conveyance was ineffectual, because not authenticated by three witnesses. This property having been claimed by Mr Wedderburn Dundas, the heir-at-law, who was also entitled under the settlement to a share of the Scotch real and personal estate, the Court of Session were of opinion that they were bound to deal with the English property under the law of approbate and reprobate, and accordingly found, "that if Wedderburn Dundas shall ultimately take the estate situated in England without surrendering the same for the purposes of the trust, he cannot be entitled to claim, under the trust deed, any share of the heritable or moveable estates in Scotland thereby conveyed to the trustees" (e). In moving the affirmance of this judgment, the Lord Chancellor (f) observed, "The Court of Session have done nothing more to affect the real estate within the liberties of Berwick than

(a) Extended by § 3 of 24 & 25 Vict. cap. 11.

(b) As to the form of procedure in Court of Session, see *Lord v. Colwin*, 7 Dec. 1861, 23 D. 111.

(c) See § 2 of Extension Act.

(d) *Dundas v. Dundas*, 14 Jan. 1829, 7 S. 241.

(e) 4 W. & S. 462.

(f) Lord Brougham.

the Court of Chancery would do in the case I have put. They have only said,—You come to us, not for the real estate, not to decide on the real estate in England, which we have no power to do; but you come to us as a legatee—you want to enjoy your fourth share under the will of the personal funds, and the heritable funds in Scotland: we have jurisdiction over them, and we put you to your election—either take the whole, according to the principles of the Scotch law, or reject the whole; take the legacy *cum onere*, or reject both the burden and the legacy” (a).

The Court of Session, with that liberality which it usually displays towards foreign Courts of judicature, recognises the jurisdiction *in personam* of such Courts in dealing with settlements which embrace Scotch heritable property. For example, in the case of *Lamb v. Montgomerie*, it appeared that Scotch heritage had been treated as personalty in an English will; and the Court of Chancery, in a suit instituted for the administration of the trust, dealing with the Scotch property under the English law of election, had obliged the heir-at-law to adopt the conveyance, as a condition of his claiming a share in the personal succession. The Court of Session had in the meantime appointed a judicial factor on the heritable estate; and a petition having thereafter been presented by the executors, praying that the judicial factor might be authorized to dispose the said heritable property to them in trust, for the uses, ends, and purposes specified in the will, Lord Kinloch remitted to English counsel for their opinion,—Whether the proceedings in England were competent and regular, and imported a final and irrevocable election on the part of the heir (a minor) of the provisions under the will; and whether, in respect of such election, he was obliged to make over the heritable property to the executors (b)? Having obtained an affirmative answer, the Lord Ordinary authorized and empowered the judicial factor to execute a conveyance in favour of the executors, as desired (c).

To what extent Foreign Courts may deal with Scotch Heritable Property.

(a) *Dundas v. Dundas*, 22 Dec. 1830, 4 W. & S. 460, 466. See also *Alexander v. Bennett's Trs.*, 1 July 1829, 7 S. 817.

(b) *Lamb v. Montgomerie*, 20 July 1858, 20 D. 1323. See also *Murray v. Baillie*, 24 Feb. 1849, 11 D. 710.

(c) In *Lang v. Robertson*, 21 June

1859, 21 D. 1011, the Court directed the rents of Scotch heritable property to be paid over to the committee on the estate of a lunatic whose domicile was in England. See *Gordon v. E. of Stair*, 8 July 1835, 13 S. 1073.

Law of "Election" applied to Heritage.

In an earlier case, relating to a will executed in India, and which indicated an intention (not effectually expressed) to convey heritable property in Scotland, the Court of Session, anxious if possible to give effect to the intention of the testator, took an opinion of English counsel upon the construction of the will, in which *inter alia* the following question was put:—If the will be not sufficient to pass real property, does it so express the testator's intention that it would put the heir to his election in any competent Court in England, whether of law or equity, if he had claimed the English real property, as well as his share of the personal estate under the will? On obtaining an opinion that the will did *not* so express the testator's intention as that it would put the heir to his election in a Court of equity in England, the Court found the heir entitled to the legacy of personal estate, without obliging him to collate the heritage (a). In another case, the Court gave effect to an opinion of English counsel affirmative of the question whether the heir was put to his election (b).

Concurrent Jurisdiction of Courts of different Countries.

It will be apparent from the principles established in the preceding cases, that where the representatives of a settlor are resident in a different country from that in which the estate (if heritable) is situated, or in which, if moveable, it falls to be administered in virtue of the *lex domicilii*, jurisdiction may be lawfully exercised by the Courts of either country. There will be jurisdiction *in personam* in the forum of the trustees' residence, and jurisdiction *in rem* in the country where the estate is actually or constructively situated.

Whether Preventive Process may be used to maintain an exclusive Jurisdiction.

To avert the mischief that would arise from a divided jurisdiction, the Courts of either country (c) are understood to have the right to restrain the parties from taking proceedings elsewhere; and the principle which has guided the Court of Session in the exercise of that right has been, to give effect to the jurisdiction of that Court in which proceedings were first instituted. Thus, in *Young v. Barclay* (d), an action of declarator had been raised in the Court of Session, on the allegation that a party deceased had died domiciled in Upper Canada, and had left heritable and moveable property,

(a) *Trotter v. Trotter*, 5 Dec. 1826, 5 S. 78; and see *Robertson v. Robertson*, 16 Feb. 1816, F. C.

(b) *Campbell v. Munro*, 23 Dec. 1836, 15 S. 310.

(c) See *Carron Co. v. Maclaren*, 24 L. J. Ch. 620, where the H. of L. (*diss.* Lord St Leonards) recalled an injunction against proceedings in Scotland, as being unnecessary.

(d) 27 May 1846, 8 D. 774.

“situated partly in Upper Canada, and partly elsewhere, particularly in Scotland,” and claiming the whole succession. After liti-contestation had taken place here, the pursuers took proceedings in the Canadian Courts for the recovery of the property situated in that jurisdiction. A note of suspension was then presented by the defenders, praying for interdict against the pursuers’ uplifting or receiving the Canadian property, or “moving or proceeding further in an action, suit, or proceeding commenced in the Probate Court at Toronto.” The Court unanimously granted the interdict.

In *Dawson’s Trs. v. Macleans* (a), where interdict was sought by the raisers of a multiplepinding for the purpose of prohibiting certain claimants from prosecuting a bill in Chancery relative to the same succession, interdict was refused mainly on the ground of the priority of the English action, coupled with the fact that the respondents were resident furth of the jurisdiction of the Court of Session. On the latter element Lord President M’Neill (b) observed: “I do not think that the mere fact of parties being furth of the country is sufficient in all cases to exclude the jurisdiction of the Court. The parties are here in proceedings dealing with the subject-matter; and if it appears, in the course of these proceedings, that, to do justice to the parties—to prevent oppression upon the parties—to prevent embarrassment from the course of the proceedings, it is necessary or desirable to impose a restraint upon them as to following out other proceedings elsewhere, which might either defeat or embarrass what is going on here, I think that the parties, being themselves here in such suits, maintaining their interests, and persevering in these suits, are subject to the control of the Court in reference to proceedings which they may be carrying on elsewhere, of the kind that I have alluded to.”

Opinion of
Lord President
M’Neill.

Where the jurisdiction of both countries is undoubted, it would appear that the right of action in each can only be determined by the rule of priority. Accordingly, in the case of *Mein v. Turner*, the Court refused to declare the right of a trustee in a sequestration to the property of the bankrupt, in respect that there was already an undischarged adjudication in bankruptcy in force against

Effect due to
Priority in the
institution of
Process.

(a) *Dawson’s Trs. v. M’Lean*, 4 Feb. 1860, 22 D. 685; and see *Kerr & Co. v. Stainton*, 27 Jan. 1857, 19 D. 318; *British Linen Co. v. Breadalbane’s Trs.*, 24 Dec. 1836, 15 S. 356.
(b) Lord Colonsay. 22 D. 691.

him in the English Courts (a). On the other hand, if it is clear that the foreign Court has no jurisdiction, the Court of Session will administer preventive justice irrespective of any question as to priority of proceedings. On this principle an interdict was granted, in a recent case, against the removing the title-deeds of a Scotch heritable succession, which the trustees, by an order of the Master of the Rolls, had been required to deposit in the Record Office of the Court of Chancery (b).

Result of the
Authorities.

These cases may suffice for the elucidation of the principle we have ventured to lay down regarding jurisdiction. We collect from them that the Court of Session adjudicates upon trust estates, either on the ground that the estate is actually or constructively within the territory, or that the trustees are within the territory; in either case enforcing its jurisdiction by appropriate remedies.

By what Law
the interpreta-
tion of the
Deed is to be
determined.

On the question, whether the municipal or the foreign law is to furnish the rule of interpretation of the deed (c), three principles may be said to be fairly settled:—1st, The construction of a deed conveying heritable property in Scotland is, in so far as it relates to heritage, governed by the law of Scotland (d); 2dly, Wills expressed in the language of Scotch conveyancing follow the same rule; 3d, Where the domicile of a settlor of personal property coincides with the place of execution, the *lex domicilii vel loci actus* regulates the interpretation of the settlement (e). And it may be observed, that an obligation to convey (f), or a direction to trustees to convey heritable property (g), seems to be subject to the same law of interpretation as a settlement of personal property. Such directions and obligations, at any rate, are effectual although not ex-

(a) *Mein v. Turner*, 15 Feb. 1855, 17 D. 435. See *Ratray v. White*, 8 Mar. 1842, 4 D. 880.

(b) *MacLachlan v. Meiklam*, 9 July 1857, 19 D. 960.

(c) As to the effect of foreign law on the authentication of deeds, and the statute 24 & 25 Vict. cap. 114, see Chap. III. Section II.

(d) *Henderson v. Selkirk*, 1795, M. 4489; *Simpson v. Barclay*, 1752, 5 Br. Sup. 794, 1 Ross, L. C. p. 1; *Montgomerie v. Innes*, 1796, Bell's Fol. Ca. 203; *Weir v. Laing*, 6 Dec. 1821,

1 S. 192; *Mackenzie v. Anderson*, 16 Nov. 1830, 4 W. & S. 328 (Her. Bond case); *Murray v. E. of Rothes*, 30 June 1836, 14 S. 1049.

(e) *Hardman v. Rouget's Trs.*, 9 July 1842, 4 D. 1506; *Melville v. Preston*, 8 Feb. 1838, 16 S. 473.

(f) *Govan v. Boyd*, 1790, Bell's Oct. Ca. 223; Ersk. 3, 2, 39, 40; Kames, Pr. of Eq. 382; Burge, Com. 1, 24. But see *contrà*, Story, Confl. 546.

(g) *Stewart v. Watson*, 1791, Bell's Oct. Ca. 225; *Cameron v. Mackie*, 29 Aug. 1833, 7 W. & S. 106; 9 S. 601.

pressed in the technical language of Scotch law. The interpretation of a settlement of personal estate expressed in the language, and executed within the territory of a country extraneous to the domicile, ought in reason to be determined by the legists of the *locus actus*; and it never has been decided that in such a case the meaning of the will can be controlled by the domiciliary canon of interpretation (a).

(1.) It is needless to multiply instances to prove that trusts of heritable property fall to be interpreted according to the rules of construction binding upon the Scotch Courts. But as it happens not unfrequently that in the interpretation of the same deed resort must be had to two different systems of law—that is, to the law of the testator's residence for the ascertainment of his intention regarding the disposal of his personal property, and to the *lex rei sitæ* for the ascertainment of the effect to be given to his disposal of real or heritable property—the question naturally arises, Which system of law is to determine the character of any given description of property as being real or personal? This question was indirectly determined by the Court of Session in the case of *Newlands v. Chalmers' Trs.* Mrs Chalmers, one of the parties whose succession was in dispute, had left a trust deed of settlement; but both this and her contract of marriage had been reduced, and the succession of her husband as well as her own were thus left to the operation of law. A multiplepounding having been brought in the Court of Session, the main point which arose was, whether certain Jamaica bonds and negotiable paper left by the husband (who had died domiciled in Jamaica) were to be deemed heritable or moveable. The Court held, on the authority of *Egerton v. Forbes* (b), that the character of the bonds—that is, whether they were real or personal property—must be determined by the law of Jamaica, where they were executed; and having obtained an opinion that the funds in question were personal property, they decreed (but upon what principle we have not ascertained) that the division of the funds should take place according to the Scotch law of succession (c). The

Lex loci rei sitæ applied in Trusts of Heritage.

(a) On this point, Story (§ 479f.-479m.) is self-contradictory. Boullenois, Dumoulin, and Burge, in the passages which he cites, leave the question open.

(b) *Egerton v. Forbes*, 27 Nov. 1812, F. C.

(c) *Newlands v. Chalmers' Trs.*, 22 Nov. 1832, 11 S. 65; *Clark v. Newmarch*, 16 Feb. 1836, 14 S. 488.

principle that the character of the subjects ought to be determined by the *lex rei sitæ* had been implicitly recognised in the earlier case of *Wightman v. Delisle's Trustees* (a); and it was assumed in *Ross v. Ross* (b), in the opinions of the judges, who held that a personal bond to heirs secluding executors was heritable *ex sua naturâ*, although it was conceded that by the law of England, which was the *locus actus* of the testament, the destination to heirs would not impress the character of realty upon a personal bond.

Settlements expressed in the technical law language of Scotland.

(2.) That Scotch law may be legitimately employed to determine the construction of foreign settlements, that are either wholly or partially expressed in Scotch conveyancing phraseology, is a doctrine well established in our law, although of comparatively recent introduction. *Cameron v. Mackie* and *Norton's Trs. v. Menzies* are examples of mixed settlements. In both cases the settlement consisted of a trust disposition in the Scotch form, coupled with an English will; and the Court applied the rules of Scotch law to the interpretation of the total settlement (c). "The will," said Lord President Boyle in the latter case, "is certainly in the English form, but it must get effect according to the law of Scotland, because there is nothing in it repugnant to that law" (d). In *Alexander's* case, the same method of interpretation was applied by the whole Court (contrary to the opinion of the present Lord President and a strong minority) to the construction of a will made in Newfoundland, and expressed in ordinary colloquial language (e).

Principle of the Decisions stated.

The principle of the decisions under consideration is perfectly defensible, within certain limits. It may be stated thus:—There is a *presumption* that the testator makes his will with a view to that law which determines his succession, and which, in virtue of that presumption, may to certain effects be imported into the settlement. But this presumption seems to be taken off when the testator deliberately clothes the expression of his will in the technical law

(a) *Wightman v. Delisle's Trs.*, 1802, M. 4479.

(b) *Ross v. Ross' Trs.*, 4 July 1809, F. C. See *Blackett v. Gilchrist*, 30 May 1832, 10 S. 590; *Murray v. E. of Rothes*, 30 June 1836, 14 S. 1049.

(c) *Cameron v. Mackie*, 19 May

1831, 9 S. 601; *Norton's Trs. v. Menzies*, 4 June 1851, 13 D. 1017. See also *Melville v. Preston*, 29 Mar. 1841, 2 Rob. 88; Rev. 16 S. 472.

(d) 13 D. 1025.

(e) *Thomson's Trs v. Alexander*, 18 Dec. 1851, 14 D. 217.

language of his native country, or, it may be, the country of his adoption, though not of his domicile. If it be granted that a testator may fix for himself a conventional domicile of succession, the selection of the language of a particular system of jurisprudence as the language of his will, is at least strongly indicative of an intention to do so. The intention will of course be clearer where an actual interpretation clause is introduced, as in the *Earl of Stair's* case, where in the marriage-contract it was agreed "that the import and effect of this contract, and all matters and questions connected with their intended marriage, shall be construed and regulated by the law of Scotland" (a). But we think a reference to the municipal law of Scotland is implied, when the testator expresses his will in the technical language of that law. These considerations receive additional confirmation from the decisions in *Hannay's Trustees* and *Ferguson v. Marjoribanks*, which we shall immediately notice, affirmatory of the principles of interpretation laid down by Lord Rutherford, whose extensive scholarship and catholic mind place him above the reproach of having been influenced, in a question of this nature, by local or insular prejudices.

In *Rainsford v. Hannay's Trs.*, Sir S. Hannay had executed a dispositive conveyance of his whole property, heritable and moveable, in favour of trustees, who were directed to convey the residue, on the expiry of certain liferents, to the truster's niece. A multiplepoinding was raised, apparently to determine the question whether the fee had vested; and a plea was put upon record, to the effect that the settlement ought to be construed according to the law of Germany, where the deed was executed, and where Sir S. Hannay had resided for thirty years prior to his death, without ever returning to Scotland. By Lord Rutherford's interlocutor, affirmed by the Second Division, it was found "that the deed of Sir Samuel Hannay must be construed according to the law of Scotland" (b).

*Rainsford v.
Hannay's Trs.*

In *Ferguson v. Marjoribanks* (c), a testator domiciled in Jamaica, by his will executed in that island, bequeathed to trustees in Scotland the residue of his estate, consisting of real and personal

*Ferguson v.
Marjoribanks.*

(a) *E. of Stair v. Head*, 29 Feb. 1844, 6 D. 905.

(b) *Rainsford v. Hannay's Trs.*, 6 Feb. 1852, 14 D. 450.

(c) *Ferguson v. Marjoribanks*, 1 April 1853, 15 D. 637.

property in Jamaica, to be applied by them in the erection and endowment of a free school *in Scotland*. The Court were unanimously of opinion, that as regards the administration of the trust at least, the construction of the will must be determined by the law of Scotland, and not by the law of Jamaica. "It were certainly a very anomalous result," said Lord Rutherford, "and one not consistent with the best interests of such a trust, that the Scotch law, which had the only direct jurisdiction, should be forced to discharge its duty not by its own light, but by the dim reflection of the English law, as it might be gathered from the opinions of English counsel. . . . The Lord Ordinary is more confirmed in this view from two circumstances;—one, that the deed, especially as regards the constitution of the Scotch trust, is expressed in apt terms of the Scotch law, and that it is not necessary for the Scotch Courts to refer to English law to give a meaning to those terms; so that the Court is not driven to go elsewhere for the explanation of words which are not immediately intelligible. The other is, that the construction which would be put upon it by the Scotch law seems to coincide with what is the plain intention of the testator" (a). The fact that Scotland was in this case also the forum of administration, formed an important element in the judgment of the Court.

Law of the
Domicile and
Place of Exe-
cution.

(3.) We have already said, that where the place of the execution of a settlement of personal property is also that of the truster's domicile, the law of that place must regulate the interpretation of the settlement. Considering the number of decisions on questions of mixed English and Scotch succession which crowd our Reports, it is not a little remarkable that there should be such a paucity of native authority on the question, whether the law of the domicile or the law of the place of execution is to furnish the rule of interpretation of deeds executed outwith the domicile. It would occupy too much space were we to refer in detail to the opinions of the civil law commentators and writers on public law on this point; but we believe their import may be correctly stated thus (b):—

Doctrine of the
Publicists.

The *lex loci executionis* is of authority to prescribe the mode in which deeds of that country ought to be authenticated, and may therefore be referred to for the purpose of ascertaining whether a settlement was or was not duly authenticated; in other words,

(a) 15 D. 639.

(b) See Note *supra*, p. 160.

whether the deceased died testate or intestate, as far as that instrument is concerned. But as regards the interpretation of the deed, a different principle comes into play. If the maker of the settlement had chanced to die intestate, his succession must, beyond all question, have been distributed in conformity with the regulations of the country of his domicile. Any testamentary settlement he may have made, is in effect a conventional modification of the legal succession, and will naturally fall to be construed by the light of the laws, institutions, and forms of expression peculiar to that nation whose prescribed order of succession it was the purpose of the settlor to alter. By some such train of reasoning the writers on public law seem to have arrived at the conclusion, that the language of testamentary settlements (a) ought to be construed by the *lex domicilii*. But the art of the conveyancer has in most countries imposed an insuperable obstacle to the application of this ingenious theory of interpretation; for, in the majority of cases, settlements are expressed in the technical law language of the territory of execution, without the least regard to the country of the settlor's domicile. Even if it were otherwise, the domicile may be changed subsequently to the execution of the will, without any corresponding change in the intention of the settlor. It seems therefore to be more agreeable to reason, as it is more convenient in practice, to construe testamentary instruments, where construction is required, in the light of the law of the place of execution, and with the assistance, if necessary, of persons skilled in the technical language of the conveyance.

Opinion of
Lord Justice-
Clerk Inglis.

The most distinct and positive expression of opinion on the subject that we have been able to find in the reports, is contained in the following sentences, taken from the speech of the Lord Justice-Clerk (b), in delivering the judgment of the Second Division in *Purvis' Trs. v. Purvis' Exrs.*:—"The law of the *domicile* of the deceased at the date of his death, must determine not only what is the *true meaning, and construction, and effect* of any will or deed of settlement he may have left disposing of his moveable estate, but also, as regards his moveable estate, whether he died testate or intestate;

(a) As to the interpretation of contracts, the greatest diversity of opinion has prevailed; some writers maintaining the application of the *lex loci solutionis*, while others assign to the law of

the place of execution the determination both of the meaning and the authenticity of the contract.

(b) Lord Glencorse. 23 D. 830.

and if he died testate, the law of the domicile must further determine what paper or papers constitute the will of the deceased." . . . "That the law of the domicile can alone settle what is the will, is a principle of international law of extensive, if not universal, application. And the forum of distribution bends to that law, and receives its instruction with unquestioning faith, in deference to this international principle."

Opinions of
Lord Lynd-
hurst, Lord
Moncreiff, and
Lord Jeffrey.

It is instructive to compare this distinct enunciation of opinion with the more guarded and ambiguous responses of eminent judges in previous cases. For example, in *Trotter v. Trotter*, Lord Lyndhurst, carefully avoiding the difficulty, observed, "A will must be interpreted according to the law of the country where it is made, and where the party making the will has his domicile"(a). Equally cautious was the remark of Lord Moncreiff in *Hardman v. Rougel's Trs.*, a West Indian will case:—"Nothing can be clearer in international law than that the construction of a will is to be regulated by the law of the place where it was made, and of the domicile of the party who made it" (b). Lord Jeffrey, Ordinary, had already tacitly evaded the difficulty, in asserting that "it was indisputable that the radical question, as to who was truly entitled to succeed, must be wholly ruled by the law of the domicile, or of the place where the instrument was made" (c).

Macpherson v.
Tytler.

In *Macpherson v. Tytler* (d), where the maker of a settlement in the English form was also the proprietor of a Scotch estate, and therefore in one sense a domiciled Scotchman, the Court took the opinion of English counsel on the construction of the settlement, the ultimate purpose of which was to consolidate into one fund the whole of the settlor's fortune and moveables, and lay it out in the purchase of lands in Scotland, which he directed to be entailed. In a recent English case, where the will was Russian, both in respect of execution and of the testator's domicile, the Court of Chancery, on being advised by Russian counsel that their rules of construction as to the effect of specific, in controlling general words of bequest, were similar to those of the English law, decided the case on their own view of the meaning of the testator (e).

(a) *Trotter v. Trotter*, 3 W. & S. 415.

(d) *Macpherson v. Tytler*, 19 Jan.

(b) *Hardman v. Rougel's Trs.*, 10 June 1829, 4 D. 1508.

1850, 12 D. 486.

(c) 4 D. 1507.

(e) *Wylie v. Enohin*, 29 L. J. Ch. 341; Affd. 3 Apl. 1862.

In all questions relating to the validity or to the construction of foreign settlements, the question where the domicile of the settlor actually was, is an element of the utmost importance. The limits assigned to our subject do not admit of our entering upon an exposition of the various presumptions and rules of evidence which have been established for the purpose of aiding the Court in the ascertainment of this question of fact. But the provisions of the recent statute (*a*), which has for its object the establishment of a positive criterion of domicile "for all purposes of testate or intestate succession as to moveables" (*b*), fall more directly within the scope of this chapter.

Ascertainment
of Domicile a
question of
fact.

The new enactment is only to be operative in questions between subjects of her Majesty and of such foreign states with which her Majesty may enter into a convention for the objects in view. In that event, and after publication by an order in Council, it is declared that every British subject, and every subject of the states that are parties to such conventions, shall respectively be held to be domiciled in the country of their allegiance for all purposes of personal succession, unless the defunct shall have been resident in the foreign country for one year immediately preceding his death, and shall also have deposited in a public office a declaration of his intention to become domiciled in such foreign country (*c*). By section 2 it is declared, that the Act shall not be applicable to foreigners who have obtained letters of naturalization in any part of her Majesty's dominions. Section 4 gives power to consuls to undertake the custody of, and, if necessary, to administer to, the personal estates of friendless foreigners dying within the British dominions (*d*).

Statutes of
1861.

The tendency of the more recent decisions has been to confine the function of the *lex domicilii* within narrower limits than were assigned to it by the publicists. The principles established in the cases of *Leith* and *Purves' Trs.* (*e*), approved by Dr Phillimore (*f*), and sanctioned by the Act of 1861, accord to it only a joint operation, with the law of the residence, in regard to matters of authenti-

Estimate of the
comparative
importance of
the Laws of the
Domicile, Place
of Execution,
and Forum of
Administration.

(*a*) 24 & 25 Vict. cap. 121; and see
24 & 25 Vict. cap. 114.

(*b*) § 1.

(*c*) §§ 1, 2.

(*d*) *Ibid.* § 3, 4.

(*e*) See p. 40, *supra*.

(*f*) Phil. Intern. Law, Addendum,
prefixed to Vol. IV.

cation. The cases of *Rainsford*, *Cameron*, and *Norton* have restricted its operation where the language employed is not that of the domicile; and *Marjoribank's* case is a direct precedent for excluding its operation in questions as to the administration of continuing trusts (a). In *Thomson's Trs. v. Alexander*, the jurists of both countries, by common consent, agreed that resort to its expositors was unnecessary in the case of a will expressed in popular language (b); and although in the latest case, *Boe v. Anderson* (c), a trust was declared unlawful, in obedience to the dictates of a foreign interpreter, there is much force in the view of Lord Deas, that the question whether a trust can be lawfully carried into effect is a question of public policy, to be determined by the law of the remedy, and not by the law of the domicile of the testator.

Mortmain Act.

As connected with the subject of the validity of foreign bequests, we may notice that legacies by English will, of money to be laid out in land or heritable securities in *Scotland*, to be applied to charitable uses within the country, do not fall within the prohibitions of the English Mortmain Act, 9 George II. cap. 36 (d). But a bequest of money to be laid out in the purchase of *lands*, with the intention of appropriating the rents to charitable uses in Scotland, was held by Lord Lyndhurst to be void in respect of the Mortmain Act, because it did not appear upon the face of the will that the testator had not contemplated the purchase of lands in *England* for the support of a charitable institution in Scotland (e). The Court of Session does not consider itself to be precluded by the Mortmain Act from giving effect to settlements made in Scotland, of stock in the British funds for charitable purposes to be executed in Scotland (f).

Some remarks upon the forum of administration will be found in first chapter on the duties of trustees.

(a) See p. 170-172, *supra*.

(b) See p. 163, *supra*.

(c) *Boe v. Anderson*, 7 Mar. 1862, not yet reported in its ultimate stage; but see 11 Nov. 1857, 20 D. 11.

(d) *Mackintosh v. Townsend*, 16 Ves. 330.

(e) *Attorney-Gen. v. Milne*, 3 Russ. C. C. 328, 5 Bligh, 593. See *Curtis v. Hatton*, 14 Ves. 537, 541.

(f) *Macara v. College of Aberdeen*, 1786, M. 15946, Hailes, 975.

CHAPTER X.

OF TRUSTS RESULTING TO THE GRANTER AND HIS HEIRS-AT-LAW.

THE trusts which we are to consider in this and the following chapter are very clearly distinguishable from those which have their origin in the settlor's will, whether express or implied. The term "Resulting Trust" is applied to the right arising or resulting to the settlor or his heirs upon a trust conveyance, the purposes of which have either not been fully declared or have become inoperative. Such trusts, although sometimes said to arise *ex lege*, are in reality constituted by the act of the settlor; the doctrine being founded on the plain principle of common sense, that when a party executes a disposition to another *in trust*, without specifying any purposes, the beneficial interest remains with the settlor himself and transmits to his heirs or executors. "Constructive trusts" are said to arise in consequence of the act of the trustee himself, when he comes into the possession of property which he was not entitled to acquire. Thus if a trustee for sale becomes the purchaser of the trust estate, or if an agent employed to make a purchase for his client takes a disposition to himself, in either case he is held to have contracted in the character of a trustee, and is bound as such to execute a re-conveyance on demand.

Resulting
Trusts distin-
guished from
Constructive.

An obvious division of resulting trusts is that suggested by the nature of the title upon which the trust arises. Under this division, we shall advert, in the first place, to resulting trusts of lapsed interests under testamentary settlements; and, secondly, to resulting trusts arising upon securities taken in the name of heirs or confidential persons, where a reservation of the beneficial interest is presumed.

Division of
Resulting
Trusts.

SECTION I.

OF RESULTING TRUSTS OF LAPSED SUCCESSION (a).

Principle
stated.

I. *Cases in which a lapse may occur.*

If a conveyance, settlement, or testamentary grant contains evidence, whether arising on the terms of the destination, or from the purposes expressly or impliedly declared by it, that the grantee was intended to take the legal estate only, the beneficial interest, or so much of it as remains undisposed of, will result, in the case of heritable property, to the settlor and his heirs, or in the case of personal property, to the executors (b). A familiar example of the principle is the case of a settlement in favour of a beneficiary,

(a) To both classes of trusts the term "Resulting Trust" has been held applicable by authorities of the greatest eminence in Scotland. For example, in *M'Leish's Tr. v. M'Leish*, Lord Moncreiff said,—"If the nature of the trust purposes and the state of the property be such that any part of the trust funds stands legally undisposed of, there may then be a *resulting trust* in the trustees for the heirs-at-law to that extent" (3 D. 924; and see *Allan v. Glasgow's Trs.*, 4 D. 509, per Lord Jeffrey). And in *Lauder v. Orr*, where the question related to the right to a dividend upon shares alleged to have been purchased by the defenders, but which were entered in the register in the pursuer's name, Lord Pres. M'Neill said, that the pursuer "having received from them the price, cannot withhold from them the shares, or the *resulting benefits*" (15 D. 677). As to Resulting Interests under Charitable Trusts, see Ch. XX. Sec. 7, *infra*.

(b) The reversionary interest of a settlor creating a trust by deed *inter vivos*, stands on the footing of his original titles; and is adjudgable by his creditors, and capable of being made

the subject of disposition (*Campbell v. Ederline's Cred.*, 14 Jan. 1801, M. Ap. Adjud. No. 14; Bell's Com., 5th Ed. I. 36; Pr. § 1996). The following statement of the rights of posterior creditors claiming the reversion, is taken from page 36 of the 1st Vol. of the Commentaries:—"1. If the trust is such as to leave no fee in the trustor, his subsequent creditors will have no share in the trust estate. 2. Where a trust is created for payment of prior debts, and the conveyance of the residue to certain persons, in such shares as the trustor shall appoint, it is held that subsequent creditors may be introduced by a supplementary trust deed, or that the trustees making advances to the trustor have right to withhold the estate till indemnified. And so, 3. A trust created for the purpose of paying off debts, and raising money for certain purposes, was held to leave in the trustor so much of his original estate as to authorize the trustees to take credit in accounting for having, in the course of their administration, paid a creditor holding certain bills due by the trustor."

without mention of his heirs ; in which case, if the beneficiary predecease, a resulting trust arises for the benefit of the settlor's heirs-at-law.

As a general rule, all interest, profits and accessions to the estate are subject to the same trusts as the funds from which they have sprung ; and therefore, where a policy of insurance had been assigned to creditors, with the view of providing a fund for the extinction of a debt due by the assured equal to the sum in the policy,—on the death of the assured, it was held, that bonuses which had accumulated to the amount of L.1100, resulted to his executors (a). As a trustee is bound to know the nature of the title on which he possesses, and to preserve the rents for the use of the beneficiaries, he can have no claim to the character of a *bona fide* possessor, and must account for the *perceptæ et consumptæ* as well as for the rents in actual possession (b).

Accessions follow the Estate.

If property is destined to A. and his heirs, simply, and A. predecease the settlor,—although the heir of A. takes the estate in the character of conditional institute, and not as under a resulting trust, it would seem that the order of succession contemplated by the testator is that of *intestacy*. And therefore, although it may be assumed that the estate would descend to the heir of conquest in the event of A. dying seized without altering the substitution, the effect of A's *predecease* is to devolve the estate upon the heir of line (c). So also, a destination to executors is held to mean next of kin, and not executors nominate (d).

Lapse may be prevented by a Destination to Heirs.

With the view of preventing the occurrence of a partial intestacy, it is usual to insert a substitution to the heirs of legatees or donees of heritable property, and sometimes also a substitution to the settlor's own lawful heirs. Such substitutions ought also to be inserted in residuary destinations where a trust of any lengthened duration is contemplated.

It may happen that a residuary legatee or heir of provision has no relatives, in which case the property would pass as lapsed suc-

(a) *Marquis of Queensberry v. Scottish Union Ins. Co.*, 1 D. 1203 ; *Shand v. Blaikie*, 21 D. 878.

1825, 3 S. 451 ; *York Buildings Co. v. Mackenzie*, 3 Paton, 378, 579.

(c) *Miller v. Miller*, 27 Aug. 1833,

(b) *Whyte v. Ballantyne*, 20 Jan.

7 W. & S. See p. 129, *supra*.

(d) *Lawson v. Stewart*, 4 S. 384.

Resulting
Trusts for the
Crown.

cession to the settlor's heirs, unless the deceased legatee had acquired a vested interest in it, transmissible to the Crown. The Crown's interest, however, as *ultimus hæres* of a beneficiary may be excluded by a destination over to the settlor's own lawful heirs (a); by which is to be understood the settlor's heirs at the time of his death, or their lawful representatives (b).

Resulting
Trusts under
the Entail
Amendment
Act.

A resulting trust may also arise through the operation of the 47th and 48th sections of the Act 11 & 12 Vict. cap. 36, where a party is seised of heritable property, upon trust to secure a liferent or other limited interest to a party of full age born after the date of the settlement. In this case the fee-simple estate results to the party in possession of the usufructuary interest, and the ulterior destinations are evacuated.

Resulting In-
terest in Pro-
fits when
Dispossee's
Title reduced.

Again, the beneficial interest may be said to result when the settlement is set aside on grounds extrinsic to the deed; for the dispositive is bound, if he have entered into possession, to account for the proceeds to the grantor's heirs. The grantee of a settlement will not be permitted to retain the beneficial interest, if the settlement itself (c), or any ratification he may have obtained from the heir (d), is tainted with fraud, or vitiated by essential error on the part of the grantor. In the usual case, fraud operates by sweeping away the deed altogether, thereby letting in the interest of the heir *ab intestato*. But there is some authority for holding, that if the fraud has been at the expense of a certain beneficiary (as, for example, where a party employed by a settlor inserts his own or a wrong name in a legacy or destination), the party in whose favour the settlement was truly made may demand a reconveyance (e).

Fraud.

If the grantor of a deed has himself contemplated a fraud upon the law, it would seem the security will be absolute, unless the

(a) *Henderson v. Dougall*, 12 Feb. 1841, 3 D. 548.

(b) *Maxwell v. Wylie*, 25 May 1837, 15 S. 1005.

(c) On this point, see Chapter V. Section I.

(d) *Murray v. Murray*, 21 Jan. 1826, 4 S. 374; *Leiper v. Cochrane*, 9 July 1822, 1 S. 552; *Fraser v. Fraser*, 7 Nov. 1834, 13 S. 703; *Ewen v.*

Hutcheon, 17 Nov. 1830, 4 W. & S. 346, revg. 6 S. 479; but see *Kyle v. Allan*, 23 Feb. 1832, 11 S. 87.

(e) *Ferguson v. Munro*, 5 Mar. 1823, 1 S. Ap. Ca. 394; *Chalmers v. Chalmers*, 1699, M. 15930; *Sinclair v. Maxwell*, 1708, M. 16186; and see *Buchanan v. Paterson*, 1704, M. 15932; *Scott v. Wilson*, 15 July 1825, 3 Mur. 523.

grantee admits the trust (a). In *Craig v. Jack* (b) the question was raised, whether a grantee under a disposition reducible *ex capite lecti* was entitled to hold the estate till relieved of debts incurred to him by the granter. It would seem that in such a case the Court would at all events sist procedure in the reduction, to allow time for the institution of proceedings for constituting the debt against the property (c).

An intention to exclude a grantee from the resulting beneficial interest, may, on the one hand, be deduced from the express terms of the deed; as where there is a disposition or testamentary settlement to certain persons, in trust for purposes to be afterwards declared, and the settlor dies without executing any deed of appropriation (d); or for trust purposes which are either set aside by the Court as inextricable (e), or unlawful (f), or which do not exhaust the estate (g), or upon trust to be distributed at the discretion of a party who dies leaving the power unexecuted (h), or for purposes which lapse by the predecease of the beneficiary (i), or in consequence of his being excluded by the law of approbate and reprobate (k). On the other hand, although the whole interest in property conveyed by deed (l) or bequest (m) has not been impressed with the character of a trust in so many words, yet if a trust is

Failure to
dispose of the
Beneficial In-
terest.

(a) *Bruce v. Grant*, 27 Feb. 1839, 1 D. 583; *Thomson v. Dove*, 16 Feb. 1811, F. C.

(b) *Craig v. Jack*, 21 May 1857, 19 D. 747.

(c) See opinion in *Craig v. Jack*, *supra*.

(d) *Sinclair v. Trail*, 27 Feb. 1840, 2 D. 694; but see *Alston v. Marshall*, 2 July 1833, 11 S. 868; *Irvine v. Bannerman*, 20 June 1844, 6 D. 1173.

(e) Bell's Pr. § 1884; *Mason v. Skinner*, 6 Mar. 1844, 16 Jur. 422, and sequel of *M'Nair's* case as there stated.

(f) *Lord v. Colvin*, 7 Dec. 1860, 23 D. 111; *Keith's Trs. v. Keith*, 17 July 1857, 19 D. 1040.

(g) *Macfarlane v. Cranstoun*, 12 Dec. 1823, 2 S. 578; and the Russian Will Case, *Wylie v. Enohin* 29 L. J. Ch. 341; *affd.* on appeal, 3 Apl. 1862.

(h) *Dundas v. Dundas*, 27 Jan. 1837, 15 S. 427; *Pursell v. Newbigging*, 25 Nov. 1856, 19 D. 71.

(i) *Torrie v. Munsie*, 31 May 1832, 10 S. 597; *Nasmyth v. Hare*, 17 Feb. 1819, F. C.

(k) *Nisbet's Trs. v. Nisbet*, 5 Dec. 1851, 14 D. 145. See *Peat v. Peat*, 14 Feb. 1839, 1 D. 508; *Leny v. Leny*, 28 June 1860, 22 D. 1272.

(l) *Finnie v. Commrs. of Treasury*, 30 Nov. 1836, 15 S. 165; *Henderson v. M'Culloch*, 12 June 1839, 1 D. 927; *Hamilton v. Gordon*, 1724, M. 6588; *Blackwood v. Dykes*, 11 S. 443.

(m) *Soutar v. M'Grugar*, 22 Jan. 1801, F. C.; *Ramsay v. Anderson*, 26 Feb. 1836, 14 S. 570; *Miller v. Black's Trs.*, 14 July 1837, 2 S. & M'L. 866; *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 914.

declared of any part of the subject of conveyance, and nothing is said as to the residue, the creation of the partial trust being manifestly the object of the conveyance, the beneficial interest which the settlor has left unappropriated, results to himself or his representatives.

Destination
in Liferent,
leaving Fee
undisposed of.

Again, a testator, while creating a liferent interest, may leave the capital undisposed of, or may revoke a destination of the capital, without touching the bequest of the life interest. In such cases it has been lately maintained that the liferenter is entitled to the entire estate, in consequence of the omission to dispose of the reversionary interest. But this seems to be straining construction too far (a). A liferenter, however, may succeed to the fee *aliunde*, in which case he would be entitled to immediate payment (b).

II. *What words give the trustee a beneficial interest.*

It is necessary, in considering this branch of our subject, to distinguish between the cases of a settlement wherein the purposes are wholly or partially undeclared, and an *ex facie* absolute disposition burdened with legacies. In the former case, the undisposed residue results to the grantor's heirs; in the latter, the fair inference is that the residue was given to the donee beneficially; and, irrespective of presumption, the donee would be entitled to it by the operation of the statute 1696, cap. 25; since *ex hypothesi* there is no declaration of trust. Under the usual style of a Scotch trust deed, by which the act of disposition is qualified by the restrictive words, "for ends, uses, and purposes," trustees are effectually precluded from laying claim to any part of the beneficial interest, whether residuary, lapsed, or undisposed of; inasmuch that, under the former law, trust donees who were also executors were held to have no claim to a share of the undisposed executory, under the Act 1617, cap. 14(c). And although a sum is declared to be "payable to the trustees," the presumption is that they are to receive it in their fiduciary capacity; for a legacy to trustees, or a gift for their trouble, can only be constituted by proper words of donation or bequest (d).

(a) See the cases noted, *supra*, Ch. VII. (p. 148).

(b) *Nisbet v. Tod*, 15 Jan. 1848, 10 D. 361; *Pretty v. Newbigging*, 2 Mar. 1854, 16 D. 667; *Martin v. Bannatyne*, 8 Mar. 1861, 23 D. 705.

(c) *Finnie v. Comrs. of Treasury* 30 Nov. 1836, 15 S. 165.

(d) *Müller v. Black's Trs.*, 14 July 1837, 2 S. & M'L. 888, per Lord Brougham.

In the construction of wills drawn by non-professional persons, it is often a question of the greatest nicety to determine whether the interest of the grantee is beneficial or fiduciary. The use of the words "trust" and "confidence" are not necessarily incompatible with the notion of a residuary interest in the grantee, if those words can be fairly held to apply only to directions as to the payment of legacies and burdens (a).

Distinction
between partial
and total Trust.

Words of exheredation will not exclude the heir in heritage from the resulting interest; and that, not only, as has been observed, because the heir is a favoured person in the eye of the law, but because there is no other party on whom the lapsed interest can devolve; and, therefore, a settlor desirous of excluding his legal representatives from the succession, must take care to accomplish his object by declaring a preference for some other beneficiary; for he cannot disinherit by a mere negation (b). Accordingly, where a settlor, after excluding the heir from the succession to his unentailed estates, conveyed his whole property, heritable and moveable, upon trust for payment of certain provisions to his younger children, reserving a power, which he never executed, to dispose of the residue, the heir-at-law was preferred to the estate, subject to the burden of the provision (c). And where an estate was destined to the issue of the heir-at-law, failing certain other parties instituted in the first place, who all predeceased the settlor without issue, the Court were clearly of opinion that the heir was entitled to the succession, notwithstanding a clause of express exclusion; and he was accordingly allowed to enter into possession of the rents, upon caution to repeat in the event of

Heir-at-law
cannot be
excluded by
disinheriting
words.

(a) *Hamilton v. Gordon*, 1724, M. 6588. In England it has also been held that the natural construction of the words "trust" and "trustee" may be negatived by the context or the scope of the instrument (*Lewin, Tr.*, 4th Ed. 112). Thus, where a father settled his estates upon his son upon the trusts thereafter mentioned, whereby certain interests were given to his wife, a daughter, and a niece, but no trust was declared of the surplus, it was held that the surplus

did not result, but belonged to the son (*Cook v. Hutchinson*, 1 Keen, 42); and a similar decision was pronounced in a case where two estates were given to a nephew, and a trust only declared as to one of them (*Hughes v. Evans*, 13 Sim. 496).

(b) *Blackwood v. Dykes*, 26 Feb. 1833, 11 S. 443; *Stoddart v. Thomson*, 1734, Elch. Succession, No. 1.

(c) *Sinclair v. Traill*, 27 Feb. 1840, 2 D. 694.

issue being born (a). But the rule is otherwise in moveable succession (b).

How an intention may be inferred to give the Trustee a beneficial interest.

The question, what words are sufficient to give the grantee a beneficial interest, has been discussed with much anxiety by English jurists; such questions being more frequently presented for decision in the Court of Chancery than with us, in consequence, we presume, of the greater laxity that has prevailed in England with respect to the styles of testamentary instruments. As the principles of construction deducible from the Chancery decisions seem to be tolerably free from the disturbing influence of technical rules, they will probably be found to be not inapplicable to similar cases occurring in Scotland, as they certainly are calculated to aid the discovery of the settlor's intention. On this ground, we have introduced into the text a condensed statement of their import.

Expressions of affection.

1. Expressions of affection or regard are evidence of an intention to benefit; and the weight to be attached to such expressions is for the consideration of the Court. The relationship of the parties is also an element of evidence. For example, where a testator, having given L.5 to his brother (who was his heir-at-law), made and constituted his "dearly beloved wife" sole executrix and heiress of all his lands and real and personal estate, to sell and dispose thereof at pleasure, the conveyance was held to be absolute. Lord Chancellor King observed, that in using the language of tenderness, the testator must have intended something beneficial, and not what would be a trouble only; and the argument was stronger when the heir had a legacy (c). But neither of these circumstances alone is sufficient to impart a beneficial character to the devise (d).

Relationship.

2. The mere description of the devisee in the character of a relation, as "My cousin," "My brother," is insufficient to exclude the heir's resulting interest (e); though in a case where the trust

(a) *Blackwood v. Blackwood's Trs.*, 11 June 1833, 11 S. 699; and see opinions, *Ibid.* p. 445; *Acton v. Alison's Crs.*, 1742, M. 14935.

(b) *Beizly v. Napier*, 1739, M. 6591. See the distinction stated *infra*, p. 188.

(c) *Rogers v. Rogers*, 3 P. W. 193.

(d) *Wych v. Packington*, decided by the House of Lords, 3 Br. Par. Ca.

(Toml. Ed.) 44, where the expression was, "My dear wife;" *Randall v. Bookey*, 2 Vern. 425; and *Hughes v. Evans*, 13 Sim. 504, where a legacy to the heir was held insufficient to rebut the presumption for a resulting trust.

(e) *Jarman on Wills*, 3d Ed. I. 534; *King v. Denison*, 1 V. & B. 276, per Lord Eldon.

purposes did not exhaust the residue, an express disinherison of the heir, taken in connection with the description of the devisee by the testator as his "most dutiful and respectful nephew," was held equivalent to a residuary destination in favour of the latter.

3. A devise of property "subject to" or "chargeable with" debts and legacies, is a beneficial conveyance of the residue, as was found by the concurrent decisions of the Courts of Chancery and King's Bench in *King v. Denison* (a). And where a testator gave all his real and personal estate to his wife "upon trust," that she at the time of her decease should cause to be paid to certain persons, should they survive her, certain specified legacies, Vice-Chancellor Stuart decided that the undisposed-of interest belonged to the wife, as the will, he thought, made her "a trustee of that portion of the property only which is given to the legatees other than herself" (b).

Where the Trust is a mere burden on a larger Estate.

4. In the case of a disposition of an estate subject to a charge, if the charge eventually fails from any cause, there is no lapse, but the devisee takes the entire estate (c).

Reverting now to native sources of authority,—if the terms of a conveyance are such as to give by implication a reversionary interest in the heritable estate to a donee, it would seem that he will also, as a favoured beneficiary, be entitled to the benefit of any lapsed legacy charged upon it (d). In the cases that have occurred relative to the vesting of legacies charged on heritage, the competition has always lain betwixt the donee and some party claiming the legacy as conditional institute (e), which is sufficient to show that the next of kin have never been supposed to have any claim; and though the donee in the cases referred to might have claimed the lapsed legacies in the character of heir-at-law, it does not appear that in any of the cases a claim was made on this footing. On principle, it is pretty clear that the donee and not the heir ought to have the benefit of the lapse. A legacy

Disposition of Heritage under burden of Legacies leaving the beneficial interest on the Donee.

(a) 1 V. & B. 261; 16 East. 233.

(b) *Williams v. Roberts*, 27 L. J. Ch. Ca. 177; *Wood v. Coz*, 6 L. J. Ch. 366.

(c) *Cooke v. The Stationers' Co.*, 3 M. & K. 264, where the distinction between the failure of a charge upon and an exception from a devise is stated by Sir J. Leach.

(d) *Breadalbane Trs. v. Lady E. Pringle*, 15 June 1841, 3 D. 357.

(e) *Cairns v. Cairns*, 11 Mar. 1829, 7 S. 571; *Dunlop v. Crawford*, 2 June 1812, F. C.; *Allan v. Aitchison*, 16 Feb. 1831, 9 S. 454; *Wilkie v. Jackson*, 9 July 1836, 14 S. 1121; *Greig v. Moodie*, 30 Nov. 1839, 2 D. 169.

charged on a special subject, is either a trust or a burden. In the former view, the conveyance to the donee personally is equivalent to a destination in his favour of the residuary interest; in the latter, which is probably the more correct view, then on the occurrence of a lapse, the burden (being in its nature personal to the legatee) is extinguished by his predecease, and never having been made real by infestment (a), it cannot affect the estate so as to give rise to a resulting interest.

Executory is in its own nature a beneficial title.

By the ancient law of Scotland there could be no partial intestacy in moveable succession, since the appointment of an executor was regarded as a bequest of the free succession, after deducting debts and legacies. But by the statute 1617, cap. 14, executors were obliged "to make count, reckoning, and payment of the whole goods and gear appertaining to the defunct, and intromitted with by them, to the wife, children, and nearest of kin, according to the division observed by the laws of this realm." The statute, however, allowed executors-nominate to retain to their own use a third of the "defunct's part," debts being deducted, and legacies to the executor being taken *in computo* of his share. This statutory interest of executors in the dead's part, which in its inception was an evident compromise between the theoretical idea of the executor's office as a trust for the next of kin and the practice of the time, long maintained an anomalous position (b) in the statute-book, until it was abrogated by the Moveable Succession Act (c), which enacts, that "So much of an Act of the Parliament of Scotland, passed in the year one thousand six hundred and seventeen, and entitled *anent executors*, as allows executors-nominate to retain to their own use a third of the dead's part in accounting for the moveable estate of the deceased, is hereby repealed, and executors-nominate shall, as such, have no right to any part of the said estate." An executor appointed by simple nomination is therefore now, in the fullest sense—as he was said to be by the institutional writers—a trustee for the

Made a Trust by Statute.

(a) See *Martin v. Paterson*, 22 June 1808, F. C.; *M. Ap. Pers. & Real*, No. 5; *Macdonald v. Place*, 24 Feb. 1821, Hume, 544; *Wyllie v. Allan*, 19 Jan. 1830, 8 S. 337; *Kerr v. Cochrane*, 10 June 1842, 1 Bell, 386.

(b) The law was never in desuetude.

See *Nasmyth v. Hare*, 17 Feb. 1819, F. C.; *Finnie v. Com. of Treasury*, 30 Nov. 1836, 15 S. 165; *Grant v. Murray*, 28 June 1852, 1 M'Q. 178, affg. 12 D. 201.

(c) 18 & 19 Vict. cap. 23, § 8.

next of kin, children, and widow, according to their several interests (a).

An important and still unsettled question is, whether executors-nominate are entitled to retain the whole succession as against the Crown. The Act 1617, cap. 14, did not alter the nature of the executor's estate and office, but merely superimposed upon it the burden of accounting *to the wife, children, and nearest of kin*, under reservation of a third. The Crown certainly cannot take in the character of next of kin; and the Act, while expressly recognising the beneficial interest of executors at common law, does not impose upon them the burden of accounting for the succession to the Crown. The Moveable Succession Act, § 8, is merely a *repealing*, not a declaratory enactment, and does not seem to touch the question. In *Finnie v. The Comrs. of the Treasury*, where the question was raised, the Court found the executors liable to account, because they were also *disponees in trust*; but Lord Corehouse reserved the general question as to the accountability of executors (b). We may add, that the construction put upon the English statute, declaring that executors shall be deemed "trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions," is adverse to the Crown's claim (c).

When an executor is appointed universal legatee or legatory, he of course holds the estate for his own benefit, subject only to such special trusts for payment of legacies, etc., as may be engrafted on the testament (d). But it does not appear that the words "universal intromitter" have ever been supposed to give a beneficial interest (e). However, it might be plausibly maintained, that as the

Can an executor-nominate retain the beneficial interest in a question with the Crown?

"Universal Legatee," a beneficial title: *quære*, as to "Universal Intromitter."

(a) Stair, 3, 4, 24; Ersk. 3, 9, 26; Bell's Pr. § 1899.

(b) See *Finnie's case*, *supra*.

(c) By the law which was in force in England prior to 11 G. IV. & 1 W. IV. cap. 40, the nomination of an executor gave a title to the beneficial enjoyment of the surplus, unless the will, expressly or impliedly, invested the executor with the character of a trustee, as by giving him a legacy for his trouble (Lewin, Tr., 4th Ed. 48). By the Act referred to he is now *prima facie* a trustee for the next of kin. But

if there be no next of kin, the executor may still retain as against the Crown, unless he is expressly declared a trustee (*Read v. Steadman*, 26 Beav. 495). See Lord Truro's opinion in *Murray v. Grant*, 1 M'Q. 183.

(d) See *Olyphant v. Olyphant*, 1626, M. 3923.

(e) The point did not arise in *Grant v. Murray* (1 M'Q. 178), as these words were not used. See the deeds narrated in 11 D. 860. In *Beizly v. Napier*, *infra*, the executor had power ("which," adds Kilkerran, "the office implies") to

Act 1617, cap. 14, only imposes the obligation of accounting upon *executors*, and does not expressly make mention of *universal intromitters*, the common law right of persons nominated in the latter capacity is not taken away. The answer would seem to depend on the meaning of the word "intromitter," *i.e.*, which is probably synonymous with executor. But since, *ex concessis*, "universal intromitter," prior to the statute, was also synonymous with, or at least equivalent to "universal legatory," the point cannot, in the absence of express decision, be considered free from doubt.

Express exclusion of next of kin.

A beneficial interest may, it seems, be given to the executors of a testament—though not of a trust disposition—by a clause excluding the right of the testator's next of kin (*a*). The reason of the distinction is, that the title of an executor is in its own nature an unqualified title. The exclusion of next of kin is therefore equivalent to a declaration that the statute 1617, cap. 14 (*sed quære* as to 18 Vict. cap. 23), is not to apply. But words of exclusion cannot give a residuary interest to executors who are also made donees *in trust*; on account of the limited nature of their title, and therefore, on failure of next of kin, the estate, as we have seen, falls to the Crown (*b*).

III. *Who are entitled to the benefit of the lapse.*

The general rule, of course, is that heritable interests go to the heir (*c*), and moveable to the next of kin (*d*). In the application of this rule, two questions of very general importance have been raised:—First, In the case of a lapse occurring at a period subsequent to the testator's death, which may happen in any case of suspended vesting, whether the heirs who are to take the resulting interest are the heirs-at-law of the defunct, or those who would

intromit with the whole money and effects of the defunct. See the meaning of these terms explained in the opinions of the judges in *White v. Finlay*, 15 Nov. 1861, 24 D. 38; where the difference in point of extent between the executor's and the universal legatee's estate is brought out; the former comprehending the entire succession, the latter consisting only of the dead's part.

(*a*) *Beizly v. Napier*, 1739, M. 6591.

(*b*) *Finnie v. Coms. of Treasury*, *supra*, p. 182.

(*c*) *Turnbull v. Cowan*, 17 Mar. 1848, 6 Bell, 222; *Sinclair v. Traill*, 27 Feb. 1840, 2 D. 695; *Finnie v. Lords of Treasury*, 30 Nov. 1836, 15 S. 165.

(*d*) *Torrie v. Munsie*, 31 May 1832, 10 S. 597; *Lord v. Colvin*, 7 Dec. 1860, 23 D. 111.

have been his heirs had he survived the term at which the lapse was determined? Secondly, Whether the character of a lapsed interest, as heritable or moveable, is affected by a direction to convert? As the investigation of such questions is more a matter of logical deduction than of positive law, the arguments which have prevailed in the Court of Chancery are not irrelevant to the inquiry, and the distinctions which have been established deserve an attentive consideration.

English doctrine.

Several cases on the first question have arisen on the construction of the Thellusson Act (a), which enacts, with reference to the appropriation of the prohibited accumulations, that they shall "go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." It was laid down by Lord Langdale, that accumulations falling under this prohibition were to be dealt with as *intestate succession*; and further, that where the fund was the produce of heritable estate, it belonged, notwithstanding a direction to convert into money, to the heir-at-law, not to the executor (b). The point was again considered in the recent case of *Macpherson v. Stewart* (c), where the residue of the testator's property was directed to be accumulated for three lives, for the benefit of his heirs. Vice-Ch. Kindersley, decided, that as the next of kin of the testator at the time of his death, had they been then living, would have taken the accumulations, the representatives of those who died within the twenty-one years were entitled to a proportional share.

Lapsed interests result as simple intestacy.

As to the effect of a direction to convert, it is matter of settled law in England, that lapsed interests are not affected by such directions, but pass as simple intestacy to the heirs entitled to succeed *ex lege* to the property as it stood in the person of the truster. And therefore, if an estate is devised upon trust to sell for a specified purpose, and that purpose fail, wholly or partially, the interest remaining undisposed of, whether the estate has been actually sold or not, results to the heir-at-law (d). This may appear to be an ex-

Lapsed interests not affected by conversion.

(a) 39 & 40 Geo. III. cap. 98.

(b) *Eyre v. Marsden*, 2 Keen, 564, 7 L. J. 220; and see *M'Donald v. Bryce*, 2 Keen, 276, 7 L. J. 173; *Tench v. Cheese*, 6 De Gex, M'N. & G. 453.

(c) 28 L. J. 177.

(d) *Ackroyd v. Smithson*, 1 B. C. C. 503; *Amphlett v. Parke*, 2 R. & M. 226; *Taylor v. Taylor*, 3 De Gex, M'N. & G. 190, 22 L. J. Ch. 742, the leading case; and see Lewin, Tr., 4th Ed. 115, and cases there cited.

ception to the well-known rule, according to which property given to trustees, subject to an express or implied trust to convert into money, passes as personal estate of the beneficiary. But the reason for the distinction is obvious. In the latter case, the testator *intended* that the estate should be enjoyed as personalty by the institute and his heirs. In the case of a lapse, the intention wholly fails; and there is no reason why the direction to convert should be carried out for the behoof of other persons than those for whose benefit it was introduced. By parity of reasoning, it has been held in England, that where money is directed to be laid out in the purchase of lands to be settled to uses which do not exhaust the estate, the surplus proceeds result to the next of kin (although, if the fund had *vested* under the settlement, it would have passed as realty); for, as Lord Eldon observed, "where the purpose fails, the intention fails; and the Court regards the settlor as not having directed the conversion" (a).

Dick v. Gillies.

The points on which we have sought for illustration in the English law, we are afraid, were decided in a Court of Session case, which, notwithstanding the eminence of some of the judges who took part in the decision, has never stood high as an authority (b). On the point as to the date when intestacy is to be ascertained, it has been overruled by *Lord v. Colvin*; the First Division of the Court of Session having declared, in answer to a remit from the Court of Chancery, that the parties entitled to lapsed accumulations are the heirs *ab intestato* of the settlor in personal estate (c), and not those who would have been next of kin to him at the time of the lapse, which was the view adopted by the judges who decided *Dick v. Gillies*.

Whether lapsed interests in Scotland are affected by the rules of conversion.

On the point as to conversion, it is necessary to explain that Mr Douglas Dick, the testator, had directed his trustees to sell his heritable property and to lay out so much on heritable securities to provide for annuities. The residue, having been made divisible among charitable institutions which were never named, became a lapsed interest. The Court decided that the price of the heritage

(a) *Ripley v. Waterworth*, 7 Ves. 435; *Logan v. Stevens*, 5 L. J. Ch. 17.

(b) *Dick v. Gillies*, 4 July 1828, 6 S. 1065.

(c) *Lord v. Colvin*, 7 Dec. 1860, 23 D. 111. The same rule is applied to destinations in favour of heirs, as in *Maxwell v. Wylie*, 25 May 1837, 15 S. 1005.

directed to be sold was to be held as moveable, and that the money directed to be laid out on heritable securities was to be considered heritable. But it must be remembered that at the date of this decision, the doctrine of constructive conversion had been little studied by our jurists.

In *Finnie v. Comrs. of the Treasury* (a), Lord Corehouse, who had not taken part in the decision of *Dick v. Gillies*, expressed a strong opinion that a power of sale, even when accompanied by words of direction, did not convert a lapsed succession from heritable to moveable; though, as the Crown was entitled to the resulting interest *utraq̃ue viâ data*, it was not necessary to decide the point. The import of the decisions in cases of simple intestacy, which present many analogies to lapsed interests, is that the nature of the subject, *as it actually stood* at the death of the testator, must determine the character of the succession (b), unless the property has been converted without the knowledge of the proprietor; as, for example, during his absence in a foreign country (c). It is to be observed, that although the principle of constructive conversion has been recognised in cases where the settlor's own next of kin have claimed a succession in virtue of a destination to them in their character as his heirs (d), yet such cases are of little moment in the consideration of the present question. The intention to convert from heritable to moveable, or the contrary, may be good to regulate the succession of the parties for whose benefit the trust was created; but it does not follow that such intention can affect a lapsed interest, which goes to the settlor's heirs, not as heirs of the destination, but as heirs *ab intestato*.

On principle
the rules should
not apply.

The view here taken is confirmed by the President's opinion, if not by the judgment in *Neilson v. Stewart* (e). The testator, by the fifth purpose of his trust settlement, directed his trustees to convert his whole means and estate into cash, and pay over the

Dictum of Lord
President
M^cNeill.

(a) *Finnie v. Comrs. of Treasury*, 30 Nov. 1836, 15 S. 165.

(b) *Williamson v. Williamson's Exrs.*, 15 Dec. 1849, 12 D. 372; *Adv.-Gen. v. Anstruther*, 2 July 1842, 13 D. 450; *Ex. Rep. No. 3*; *Ramsay v. Cowan*, 11 July 1833, 11 S. 967; *Davidson v. Kyde*, 1797, M. 5597.

(c) *Garland v. Stewart*, 12 Nov 1841, 4 D. 1.

(d) *Angus v. Angus*, 6 Dec. 1825, 4 S. 279; *Lawson v. Stewart*, 24 Jan. 1826, 4 S. 384; *Patrick v. Nichol*, 7 Dec. 1838, 1 D. 207.

(e) *Neilson v. Stewart*, 3 Feb. 1860, 22 D. 646.

free proceeds thereof to the children of D. S. By a codicil, executed on death-bed, he revoked the fifth purpose, *in so far as it provided for the disposal or division of the proceeds of the residue of his said means and estate*, and gave other directions as to its disposal; but left the direction to sell intact. The question was, Whether the heir-at-law had a title to reduce the codicil *ex capite lecti*? If the effect of rescinding the codicil would have been to let in the personal representatives as heirs of the heritable estate directed to be sold, the heir must have been excluded by want of interest from insisting on the reduction. But the judges of the First Division unanimously sustained the heir's title, and were of opinion that the codicil was effectual as a revocation of the residuary destination under the settlement, and that the lapsed interest in the heritable subjects directed to be sold resulted to the heir-at-law; and they accordingly reduced the settlement.

Lapse saved
by Residuary
Destination,
etc.

Any interest that would otherwise have lapsed, may of course be saved by a destination over, or clause of survivorship, or finally by a general residuary destination. We forbear to treat further of these clauses at present, as their effect will be considered more appropriately in the concluding part of the volume, as having relation to the beneficial interest under the trust.

Or by a pre-
vious unre-
voked settle-
ment.

The heir's resulting interest may, as regards lapsed shares, also be effectually excluded by the operation of a previous unrevoked settlement, disposing of the same estate in a different manner; for the implied revocation wrought by a posterior deed has relation only to such dispositions of the estate as are irreconcilable with the prior disposition; and if the destination in the second deed fails by lapse, there is no longer any repugnancy, but a mere failure in the second settlement to alter the destination of the first (*a*). And even though the later settlement should contain an express revocation of all prior wills, *in so far as* inconsistent therewith, yet if it omit to dispose of any particular subject, the disposition of the first settlement as to that subject remains in force (*b*).

(*a*) *Alves v. Alves*, 8 Mar. 1861, 23 D. 712.

(*b*) *Allan v. Glasgow's Trs.*, 28 Jan. 1842, 4 D. 494.

SECTION II.

OF RESULTING TRUSTS UPON EX FACIE ABSOLUTE TITLES.

In the law of England, there is a presumption in favour of donation, in the case of securities taken or delivered to children of the grantor; in the case of strangers or more distant relatives, the presumption is for a trust. But there are many exceptional circumstances which have been held to transfer the onus of proof, for or against the donee (*a*). It cannot be said that any exception to the maxim *donatio non presumitur* has been recognised by our Courts in the case of questions arising between claimants as donees, and the general representatives of a defunct (*b*); nor does it appear that there is any reason for departing from the rule of the civil law, on the ground of presumed favour to any particular heir, seeing that the presumption is equally strong that the deceased intended to favour *all the parties* standing towards him in the relation of heirs, whether by operation of law or in virtue of a previous destination. Accordingly, the general rule is, that where a donation is alleged to have been made by *delivery* of a document of debt, the claimant must take an issue of donation (*c*), but if the donation is in writing it will stand good.

Doctrine of the English Law.

Presumption against Donation in Scotland.

Where the alleged donation has been made by way of tradition, as in that case a trust for the grantor's representatives can only arise *ex lege*, and not upon a written *declaration*, parole evidence is of course competent to disprove it, and is usually the only kind of evidence of which the case admits. Where the claimant's case is one of alleged delivery to a trustee or confidential person

Conveyance of Property or Securities by Tradition.

(*a*) The doctrines of the English law in relation to resulting trusts upon conveyances are of a technical character; being based partly on the provisions of the Statute of Frauds, and partly upon principles established by decided cases, and which, however equitable in their results, can only be regarded in relation to Scotch jurisprudence, as arbitrary rules of construction. On this account, and also because the English authorities have never been recognised

in this department of jurisprudence, we have not thought it necessary to refer to them.

(*b*) *Stair*, 1, 8, 2; *Ersk.* 3, 3, 92; *Mackellar v. Hunter*, 5 Mar. 1858, 20 D. 761; and see *Mackenzie v. Brodie*, 24 June 1859, 21 D. 1048; *Fyfe v. Kedslie*, 6 Mar. 1847, 9 D. 853; *British Linen Co. v. Martin*, 8 Mar. 1849, 11 D. 1004.

(*c*) *Wilkie v. Chalmers*, 16 June 1854, 16 D. 961.

Mandate to
donate.

for the purpose of handing over the security to him, the competency of parole evidence depends on the circumstance whether the donation has been completed in the lifetime of the truster. "There is an essential difference," as observed by Lord Cowan, "between the case of an attempt to enforce donation not completed in the lifetime of the donor, and the case of an attempt to set aside a completed donation; and this distinction as regards the evidence that may be competent becomes the more clear when the transaction has been actually carried through, or is intended to be so by the agency of a third party. . . . It comes then to be a mere pollicitated promise to donate, which cannot be enforced unless proved by writ or oath" (a). It would be difficult to distinguish in point of principle between an unexecuted mandate to make a donation to a beneficiary and an ordinary nuncupative legacy, to which, accordingly, the former class of cases has been assimilated (b). On the other hand, it has been settled that a mandate to donate, if carried into execution in the lifetime of the mandant, may be proved by parole; because the title of the donee no longer rests upon the verbal promise, but is completed by delivery of the security itself (c). As to donations of cash and corporeal moveables on death-bed, the rules of evidence are similar; the fact of possession in such circumstances being insufficient to constitute a *prima facie* title to the subject (d).

Donation by
Deed *inter
vivos* followed
by delivery.

We pass to the consideration of proper conveyances *inter vivos*, as by indorsation (e), assignation (f), bond (g), or disposition (h), granted without consideration or for a rational cause; e.g., as provi-

(a) *Mackenzie v. Brodie*, 24 June 1859, 21 D. 1048; see 1051.

(b) *Forsyth's Trs. v. Maclean*, 18 Jan. 1854, 16 D. 343; *Barstow v. Inglis*, 5 Dec. 1857, 20 D. 230. See *Milroy v. Milroy*, 31 May 1803, Hume, 285. But the delivery of a bill to a trustee for the purpose of being given up to the obligant was sustained as a discharge of the debt, although the mandate was not executed in the grantor's lifetime; *Barclay v. Fairly*, 13 June 1849, 11 D. 1133.

(c) *Mackenzie v. Brodie*, 24 June 1859, 21 D. 1048; *Ritchie v. Ritchie*, 6 June 1858, 20 D. 1093.

(d) *Little v. Little*, 28 Feb. 1856,

18 D. 701. But a transference of a tack and farm stocking to the grantor's son without writing, when the father was in *liegje poustie*, was held to be a donation *quoad* the stocking, in *Black v. Black*, 1795, Hume, 290.

(e) *Murray v. Todd*, 6 Mar. 1848, Hume, 275.

(f) *Hay v. Angus*, 1795, Hume, 281. Here the assignation was held not to be subject to legitim. *Farquhar's Trs. v. Stewart*, 27 Feb. 1841, 3 D. 658.

(g) *Dundas v. Dundas*, 12 June 1827, 5 S. 790.

(h) *White v. White*, 28 Jan. 1841, 3 D. 468.

sions to the grantor's children, or to persons possessing the character of heirs. In all such cases, as well as in the case of securities taken in name of the favoured individual, if delivery of the document has taken place, and still more if this has been followed by transmutation of possession, the presumption *for* donation arising on the face of the title is absolute, and a trust cannot be reared up except by proof *scripto vel juramento*, in terms of the statute 1696, cap. 25. Parole evidence has been admitted in one or two cases, where the grantee was also the trustee of the deceased (a). But such decisions can scarcely be supported on sound principles of interpretation of the statute 1696, cap. 25. Even as matter of probability, it is not very clear that a party clothed with a trust of all the property of which a settlor may *die* possessed, is bound by the trust purposes in a question regarding property delivered to him by the settlor in his *lifetime*. If an assignment is proved to have been made for an onerous cause, the donees (although heirs of the grantor) will only be permitted to retain the fund upon condition of fulfilling the counter prestation (b).

Next, where the security has been retained by the deceased in his own hands, or in the custody of a neutral person, it is a question of intention whether the transaction is to be regarded as a donation or a trust. The death of the grantor is not equivalent to delivery, in the case of deeds not *ex facie* of a testamentary nature; and it is obvious that undelivered deeds of conveyance do not fall within the scope of the statute 1696; for the grantor cannot be expected to call for a back-bond of trust in relation to a deed of security which he retains in his possession. The nature of the circumstances from which an intention to donate, or the contrary, may be inferred, will be best exhibited by a comparison of the more important cases; though, where so much depends upon intention, it is impossible to rely implicitly on any particular combination of circumstances as a precedent in similar cases.

In the first place, it is settled that the real proprietor may alter the destination (c), or denude the nominal grantee, at any time dur-

Where Deed undelivered, whether Beneficial Interest results?

When Donation is not presumed.

(a) *Henderson v. M'Culloch*, 12 June 1839, 1 D. 927.

(b) *Waddell's Trs. v. Waddell*, 20 June 1843, 5 D. 1233.

(c) *Jeffrey v. Aitken*, 11 Feb. 1831, 9 S. 423.

Cases where
Donation was
not presumed.

ing his life, if there has been neither delivery nor transmutation of possession (a). Where a sum has been originally advanced on loan, a donation will not be presumed (b). Sums advanced to children will be imputed in satisfaction of any claims they may have under their father's marriage-contract (c). In *Keddie v. Christie* (d), a deposit receipt, taken by a father in name of one of his children, and found undelivered in his repositories after his death, was held to form part of the general executry estate; and in *Heron v. M'Geoch* (e), trustees, to whom the residue of the granter's estate was bequeathed for their own absolute use, were found entitled to insist against one of their number as a resulting trustee of deposit receipts which had been delivered to him three years before the granter's death, and which nearly exhausted the residue; the defender having failed to prove donation. In *Cruickshanks v. Cruickshanks* (f), a majority of the judges of the Second Division, affirming the judgment of Lord Rutherford, decided that an undelivered deposit receipt, taken by a father in the joint names of himself and his son, or the survivor of them, could not receive effect as a donation. The want of delivery precluded the supposition of a donation *inter vivos*, and it could not be presumed without extrinsic evidence that a gift *mortis causa* was intended (g). Where a document of debt is taken in the name of two parties jointly, the Court will inquire from what source the money was advanced, and decree accordingly (h).

Circumstances
inferring Do-
nation.

On the other hand, it would appear that where the granter stipulates for a reconveyance on demand, the circumstance of the donee having been made a party to the arrangement is equivalent to delivery; and, therefore, if the granter die without recalling the destination, the gift will take effect as a donation. This was the principle of the decision in *Fyfe v. Kedslie*, where a majority of the whole Court decided that a transference of bank stock *inter vivos*

(a) *Dallas v. Leishman*, 1710, M. 16191; *Edgar v. Hamilton's Trs.*, 12 June 1828, 6 S. 963; *Fyfe v. Kedslie*, 6 Mar. 1847, 9 D. 853.

(b) *Guthrie v. Dunbar*, 7 June 1821, 1 S. 50.

(c) *Murray v. Murray*, 5 Dec. 1843, 6 D. 176.

(d) *Keddie v. Christie*, 24 Nov. 1848, 11 D. 145.

(e) *Heron v. M'Geoch*, 13 Nov. 1851, 14 D. 25.

(f) *Cruickshanks v. Cruickshanks*, 10 Dec. 1853, 16 D. 168. See *Mackellars v. Hunter*, 5 Mar. 1858, 20 D. 761.

(g) Per Lord J.-C. Hope, 16 D. 169.

(h) *Cuthill v. Burns*, 20 Mar. 1862.

into the names of two of the grantor's nephews who were among the residuary legatees, qualified by a back-letter, gave the donees a right to the stock, in addition to their shares of the residue (a). It would appear that an unqualified special assignation executed on death-bed, as, for example, a transference of a deposit receipt in the bank books, is a good donation *mortis causa*; such conveyances, when executed *intuitu mortis*, being effectual, like testamentary writings, without delivery (b).

We proceed to notice two recently decided cases, in which the effect of the laws of marriage and succession in modifying the construction of special destinations was the subject of consideration. In *Craig v. Galloway* (c), the House of Lords sustained a destination in a policy of life assurance to the wife of the assured, as a valid constitution of a post-nuptial provision in favour of the wife; and as the provision in this case was considered to be reasonable in amount, their Lordships held that the husband's bankruptcy did not revoke it. In *Cuthill v. Burns* (d), a deposit receipt had been granted to a husband and wife, payable to the parties jointly and to the longest liver. In a competition for the fund between the wife and the husband's heirs, a majority of the judges of the Second Division dissented from Lord Mackenzie's ruling, to the effect that the wife was entitled to the sum in virtue of the destination; while sustaining her claim on the ground that the deposit was from her own funds. This reasoning has not satisfied us that the Lord Ordinary was wrong; for, though a receipt is not a testament, its terms may be evidence of a *donatio mortis causa*.

Marriage-contract provision may be settled by destination in a deed of title.

Destinations to heirs and assignees in the titles of estates, being regarded as necessary words of style, mean no more than that the subject shall go to the heirs-at-law, in the absence of any settlement conveying the subject to other heirs. Accordingly, the right of the trustees under a general trust disposition and settlement is preferable to that of the heir-at-law, under a destination to heirs and assignees (e). And where a power was reserved to a father by his

Destination to heirs and assignees in title deeds.

(a) *Fyfe v. Kedslie*, 6 Mar. 1847, 9 D. 853.

(b) *British Linen Co. v. Martin*, 8 Mar. 1849, 11 D. 1007; and see *Stair*, 1, 8, 31; 4, 45, 17; *Ersk.* 3, 3, 91.

(c) *Craig v. Galloway*, 17 July 1861, 23 D. (Ap. Ca.) 12, reversing 22 D. 1211.

(d) *Cuthill v. Burns*, 20 Mar. 1862.

(e) *Farquharson v. Farquharson*, 6 Paton 724, affirming M. 6596, 2290.

marriage-contract to distribute his estates amongst his children, in such proportions as he pleased, and, failing such apportionment, his entire estate was to be divided equally amongst the children, the subsequent acceptance of a title to heritable property in favour of himself, his heirs and assignees, was held not to import an exercise of the power, as to this subject, in favour of his eldest son (a). An ultimate destination of heritable estate in a contract of marriage to heirs and assignees, on failure of issue of the marriage, was held ineffectual to exclude the heir of provision under a previous settlement, no issue having been born (b). But the decision would probably have been different, if a failure had occurred in consequence of the *predecease* of issue, on the principle that the birth of issue operates as an implied revocation (c).

Security
Titles.

Resulting interests are also raised upon conveyances *inter vivos* in other ways ; as in the case of an *ex facie* absolute disposition delivered to a creditor with the intention of making the property available as a security for advances ; in the case of a purchase by an agent who interposes his security for the price, and in the meantime takes a disposition to himself ; in the case of latent partnerships or interests in joint stock companies. The fiduciary relations arising out of this class of transactions having already been considered in treating of the Proof of Trusts under the statute 1696, cap. 25, it is unnecessary to revert to the subject (d).

Case of mis-
take in the des-
tination of the
Investiture.

If trustees have invested funds in their own names for behoof of parties whose beneficial interest is excluded by a preferable title, the resulting interest may be claimed by the preferable beneficiary directly from the trustees (e). Accordingly, where trustees had taken securities in their own name for behoof of a legatee under the trust settlement, and a competing claim by creditors under a marriage-contract was afterwards sustained, the Court, on the suggestion of Lord Rutherford, declared,—“ That the sums contained in the four several securities, and in the deposit²-receipt, which are

(a) *Jardine v. Jardine*, 22 Jan. 1850, 12 D. 505. See *Murray v. Murray*, 17 May 1826, 4 S. 589, as to whether a life-interest was raised to a fee by a title-deed destination.

(b) *Weir v. Steele*, 1745, M. 11359.

(c) *Ersk.* 3, 8, 46.

(d) See Chapter III. Section I. (Statute 1696).

(e) *Buik v. Patullo*, 14 Nov. 1854, 17 D. 44.

specially claimed by Mrs S. as having been invested or set apart by the trustees for her behoof, cannot be held as payments duly and irrevocably made to her, or placed beyond the power of the trustees or of the Court in this multiplepointing, in so far as these are required to be replaced in the ultimate accounting, in order to satisfy the claims of the widow and son as creditors under the marriage-contract, and the claim of the son for his legitim" (a).

The Court cannot give effect to a resulting trust in evasion of an Act of Parliament; and therefore, if the purchaser of a ship subject to the Navigation Laws, had taken the registered transfer in the name of another party, the complete ownership, legal and equitable, vested in the transferee (b). In *M^rArthur v. M^rBrair*, the vessel had been registered in the name of the individual members of a firm, and a claim by the company against the bankrupt estate of one of the partners, on the ground that the vessel was company property, was disallowed (c); and where shares of a vessel, alleged to be company property, had been assigned by one of the partners, as registered owner, within sixty days of the bankruptcy of the company, the Court would not regard the transaction as an illegal preference granted over the company property (d). As it was part of the policy of the Navigation Laws to prevent unqualified persons from holding a beneficial interest in British shipping, trusts of ships were entirely prohibited, and the Courts were unable even to enforce implement of an agreement to transfer (e), though they could take notice of a trust when stated as an objection to the title of the registered owner (f). But since the abolition of those time-honoured enactments (g), latent trusts may be established against the registered owner himself, though, of course, not against an onerous assignee (h).

Latent Partnerships in Shipping Property prohibited by Act of Parliament.

(a) 17 D. 49, 50.

(b) *M^rArthurs v. M^rBrair*, 20 June 1844, 6 D. 1174; *Ord v. Barton*, 3 July 1846, 8 D. 1011; *Boyd's Exr. v. Martin's Exr.*, 16 June 1847, 9 D. 1234.

(c) 6 D. 1174.

(d) *Ord v. Barton*, *supra*.

(e) *Calder v. Miller*, 12 Nov. 1824, 3 S. 253.

(f) *Scott v. Miller*, 16 Nov. 1832, 11 S. 21.

(g) Trusts of shipping property are now regulated by the Merchant Shipping Act, 1854 (17 & 18 Vict. cap. 104; see §§ 38, 39, 43).

(h) *Boyd's Exr. v. Martin's Exr.*, *supra*.

CHAPTER XI.

OF CONSTRUCTIVE TRUSTS RAISED BY THE ACT
OF THE TRUSTEE (a).

Definition of
Constructive
Trusts.

A CONSTRUCTIVE TRUST, says Mr Lewin, is raised by the Court, wherever a person clothed with a fiduciary character gains some personal advantage, by availing himself of his situation as trustee. For, as it is impossible a trustee should be allowed to make a profit by his office, it follows that, as soon as the advantage in question is shown to have been acquired through the medium of the trust, the trustee who has acquired it may be compelled to hold it, subject to the disposal of the beneficiary (b).

Authorities
cited in sup-
port of the
general doc-
trine.

The doctrine was laid down in similar terms in *Hamilton v. Wright* (c), a case relating to the purchase of a security by a trustee. The trustee, it was observed, "was not under any legal disqualification from acquiring; but, being trustee for the suspender, and bound as such to enlarge his and the creditor's funds, he could only acquire for behoof of the trust estate. This was the general principle of the law of Scotland, not merely in the case of direct trustees, but of guardians, executors, etc., and of all those who are in the situation of being trusted for behoof of another." This coincides with the opinion expressed by Lord Brougham, who, in delivering judgment on the appeal, observed, that the *knowledge*

Lord
Brougham.

(a) Lewin, Tr. Chap. IX. See Stair, 1, 6, 17. The doctrine of constructive trusts, although not systematically treated in any native work of authority, is, as will be seen from the passages cited in the text, of very old standing in this country, having been enunciated and enforced by Lord Thurlow in the case of the *York Buildings Co. v. Mackenzie*, 13 May 1795, 3 Paton, 378.

(b) The principle is illustrated in an early case, *Sinclair v. Marrell*, 1708, M. 10186. The defender had undertaken by a friend to procure a legacy to be left to him by a party with whom he had influence; but, instead of doing so, he obtained the legacy in his own favour. The Court held the defender bound to account for the fund.

(c) *Hamilton v. Wright*, 1 D. 673, per Lord Cockburn.

acquired by a trustee in reference to the subject of purchase, was of itself a sufficient ground of disqualification, and of requiring that such knowledge be not only not used to the detriment of the trust, but be not used for the trustee's own benefit (a).

In the case of the *York Buildings Co.*, the principle of the decision was, that purchases by trustees, though not to be set aside as null, could only be supported as purchases made constructively for behoof of the trust estate. Lord Thurlow said it was supposed, on the one side, that the circumstance of the purchaser being common agent, created some legal disability in him to enter into the purchase at all; and that it was therefore unlawful, and must be cut down. On the other side, it seemed to be imagined that they had only to dispose of that objection, and prove that there was no rule which made a contract so entered into unlawful. And, disregarding both views, his Lordship was of opinion, that while no man could be trustee for another but by contract, it was clear that under circumstances a man might be liable to all the consequences in his own person which a trustee would be liable to by contract. This contract of sale, according to all the forms of it, was a valid and good one, and the estate was by that means vested in Mr Mackenzie; yet, from the manner in which the estate was purchased, and under the circumstances of the case, in point of equity, he ought to be compelled to reconvey (b).

Lord Thurlow's dictum.

The principle of putting a quasi-fiduciary construction on illegal purchases by trustees, was as clearly recognised by the judgment in *Fraser v. Hankey* (c); where Lord President Boyle observed (d), "There seems, however, no authority for holding that such a purchase actually creates what may be termed a *labes realis*, or amounts to an absolute nullity;" and Lord Fullerton (e), observing on the *York Buildings* case, said—"A trustee is understood to be acting rightly for the parties who are his constituents, and is therefore bound to hold for their behoof, and to account to them. That appears to be the principle on which the decision in the case of Mackenzie turned. When the case came back from the House of

Dicta of modern authorities.

(a) *Hamilton v. Wright*, 2 Aug. 1842, 1 Bell, 574, see 591.

(b) *York Buildings Co. v. Mackenzie*, 13 May 1795, 3 Pat. 398.

(c) *Fraser v. Hankey & Co.*, 13 Jan. 1847, 9 D. 415.

(d) 9 D. 423.

(e) 9 D. 430.

Lords, it did so with an order on Mackenzie, the common agent, to account with his constituents. It just seems to have been held there, that though Mackenzie, as common agent, had got possession of the estate, he was held as so possessing it for the creditors up to the time when he was compelled to reconvey." And to the same effect is the observation of President M'Neill (a), in the case of *Laird v. Laird*: "The law will presume that the trustee intended that the profits should go to the beneficiary, rather than presume that he intended his own aggrandisement, at the risk or expense of the beneficiary." It is apparent from the nature of constructive trusts, that these rights, arising, as they do, *quasi ex delicto*, are not governed by the provisions of the Act 1696 as to proof. And this was expressly found in an early case (b).

Purchases of
Trust Estate
by Trustees.

The cases above cited, as illustrating the general definition of a constructive trust, may also suffice to show that the law relating to purchases of trust property by trustees forms an important branch of the subject treated in this chapter. As it will be necessary, however, to treat more fully of illegal purchases when we come to consider the duties of trustees for sale (c), we do not propose in this place to enter upon a review of the cases.

Renewal of
Leases.

One of the numerous applications of this principle, of great importance in English practice, relates to the renewal of leases; the rule being, that if a trustee or agent renew a lease in his own name, he shall be held to have taken it in trust for the parties interested in the original lease (d). The rule is so strictly enforced, that even if a landlord refuse to grant a renewal in favour of a minor beneficiary, and the trustee accordingly takes the lease in his own name for his own benefit, the Court will oblige him to assign to the infant (e).

(a) Lord Colonsay, 20 D. 981.

(b) *Spreul v. Crawford*, 1741, Elchies, Adjudication, No. 30.

(c) See Chap. XVII. Sec. 8.

(d) See Wh. & T. L. C., *infra*.

(e) *Sandford v. Keech*, Sel. Ch. Ca. 61, 1 White & T. L. Ca. 32. A lessee of the profits of a market had devised to a trustee for an infant; and the trustee having been refused a renewal in name of the infant, took a lease for the benefit of himself. The Court of

Chancery held that there was a constructive trust for the infant. Lord King observed: "If a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed." A few of the leading decisions on this

The corresponding Scotch decisions (a) are of no great interest, except as establishing the general doctrine, which appears indeed to have been recognised at a very early date. Thus, in a case which was decided in 1632, the question was raised very purely. The factor to a tutor had obtained a tack of teinds in favour of his wife in liferent and the pupil in fee. It appeared that the lady had a liferent over part of the lands themselves, as to which therefore her right to obtain the tack was undisputed. "But for the teinds of the rest of the lands of the minor, whereof she had no liferent, the Lords found that the benefit of the tack in that ought to accresce to the minor and not to the conjunct fiar (the factor's wife), nor to the factor, nor to the tutor; the minor always paying a proportion *pro rata* of the grassum of the tack" (b). And where the widow of a tenant had continued in the possession of the farm, and subsequently obtained a renewal of the tack in her own name, the Court decided that the right to the new lease belonged to her daughters, as the parties entitled in law to succeed to their father's

important topic (selected from White & Tudor's Leading Cases, pp. 33-39) may be noted:—

Life Interests.—Testator bequeathed leaseholds to his widow for life, with remainder over: The leases expired during the life of the widow, who renewed: Held, that the new leases were subject to the trusts of the will (*James v. Dean*, 11 Ves. 388, 15 Ves. 236). A tenant for life of renewable leaseholds had a general power of appointment, which she did not exercise: Held, that a renewal in her own name, not being an execution of the power, enured at her death to the remainderman (*Brookman v. Hales*, 2 V. & B. 45).

Joint Owners.—If one of several renew in his own name, he will hold in trust for the entire body (*Palmer v. Young*, 1 Vern. 276; *ex parte Grace*, 1 B. & P. 376).

Partners.—"One partner cannot treat privately and behind the backs of his copartners, for a lease of the premises where the joint trade is carried on, for his own individual bene-

fit: if he does so treat, and obtains a lease in his own name, it is a trust for the partnership" (per Sir W. Grant in *Featherstonehaugh v. Fenwick*, 17 Ves. 811).

Mortgages.—If either the mortgagor or the mortgagee renew, the new lease will be held a graft on the old one for the respective interests of both parties (*Rushworth's case*, Freem. 12, Finch. 392, 2 Ch. Rep. 118; *Smith v. Chichester*, 1 C. & L. 486).

Agents.—In such transactions agents are dealt with as trustees (*Edwards v. Lewis*, 3 Atk. 538; *Mulhellen v. Marum*, 3 D. & W. 317, where the transaction was set aside by Sir E. Sugden, Lord Ch. of Ireland).

(a) *Wilsons v. Wilson*, 1789, M. 16376; *Bee v. Wallace's Exrs.*, 1745, M. 6008, 6011; *Parkhill v. Chalmers*, 1771, M. 16365, 12 Feb. 1773, 2 Pat. 291; *Seth v. Hain*, 14 July 1855, 17 D. 1120.

(b) *Ludquhairn v. Haddo*, 1632, M. 9503.

possession (a). In another case (b), the tutor-at-law of the pursuers (who were the children of a tenant) had renounced the subsisting tack, and, in consideration thereof, obtained a new lease for fifteen years, which he again renewed just before the tutory expired. After having in this way acquired a fortune of several thousand pounds, he was sued by his wards for payment of the whole profits of the business; and although some of the judges were of opinion that the defender should only be obliged to pay the "surplus rents," the Court, after repeated argument, found that the defender was obliged to account for the *profits* arising from the farm in question during the whole period of the currency of both leases (c). The case of *Parkhill*, decided by Lord Bathurst (d), appears to have been quite exceptional in its circumstances, and does not touch the principle in question; for the lease was not renewed by the curator in his own name until after his ward had attained majority, and although the pursuer pleaded that the latter was absent at the time on foreign service, he was obviously, on that very account, unlikely to have succeeded in obtaining a renewal in his own name (e).

Rights of onerous Assignees respected.

If the new lease be assignable, and is disposed of to an onerous purchaser, it may be assumed that the right of the latter will be respected, agreeably to the principle of *Fraser v. Hankey* (f); the beneficiary's remedy being thus restricted to a claim for damages against the trustee. But if the original lease were registered under the Leases Act, 1857 (g), which provides for the registration of renewals, as in a progress of titles, the purchaser's right would seem to depend upon the means which the register afforded of discovering where the beneficial interest lay.

Renewal of Leases by Tutors and quasi-Trustees.

We have seen that the disability in question is not confined to trustees, strictly so called. And accordingly, if a tutor (h), a curator (i), an interdictor (k), an executor (l), an assignee in

(a) *Bee v. Wallace's Exrs.*, 1745, M. 6008. See p. 6009.

(b) *Wilsons v. Wilson*, 1789, M. 16376.

(c) M. 16378.

(d) *Parkhill v. Chalmers*, 12 Feb. 1773, 2 Pat. 291.

(e) 2 Pat. 296; and see M. 16365.

(f) *Fraser v. Hankey*, 13 Jan. 1847, 9 D. 415.

(g) 20 & 21 Vict. cap. 26, § 17.

(h) *Wilsons v. Wilson*, M. 16376.

(i) *Parkhill v. Chalmers*, 2 Pat. 291.

(k) *Campbell v. Campbell*, 1761, M. 7156.

(l) *Bee v. Wallace's Exrs.*, M. 6008.

security (*a*), or a factor acting under the authority of a trustee (*b*), renew the lease on his own account, he will be deemed to hold constructively as trustee for his constituent. Although the trustee have himself a partial interest in the subjects, he is not on that account entitled to obtain a renewal of the entire interest to himself (*c*); because it would be inequitable to permit a person who has duties to perform towards another, to avail himself of his situation so as to obtain a disproportionate advantage in derogation of those rights which he has undertaken to protect.

The cases we have cited, show that the rule will not be relaxed although the renewal is for a different term or at a different rent (*d*); or after the original lease had expired, the landlord being under no obligation to renew (*e*); or although a reversion is secured for the beneficiary (*f*). Where the lease in question was not a renewal, but an original tack, of the teinds leviabie from the trust estate, the trustee was obliged to refund (*g*). The same equitable principle was enforced, where an interdictor had obtained for himself the renewal of a wadset in which his constituent stood creditor (*h*).

Immaterial
that the terms
of the new
Lease are
different.

Where the ground of action is, that a voluntary trustee, or a creditor in possession, has obtained a renewal of a lease in his own name, pursuant to a renunciation by the tenant himself, subject to an obligation to account to the latter, the trust can only be proved by writ or oath under the statute 1696 (*i*). If a beneficiary acquiesce in the trustee's discharge for any considerable time, he will be held to have abandoned his claim (*k*).

Exceptional
cases.

It is of course implied in the above decisions, that the trustee is not only bound to assign the lease to his constituent when required, but is also accountable for the profits made by his occupation, and compellable to refund, *e. g.*, even after the renewed lease has expired (*l*). But the trustee will be entitled to take credit for

Trustee must
account for
Profits.

(*a*) *Seth v. Hain*, 14 July 1855, 17 D. 1120.

(*b*) *Ludquhairn v. Haddo*, M. 9508.

(*c*) *Ibid.*; *Parkhill v. Chalmers*, M. 16365 2 Pat. 291.

(*d*) *Wilsons v. Wilson*, M. 16376.

(*e*) *Bee v. Wallace*, M. 6008.

(*f*) *Ludquhairn v. Haddo*, M. 9508.

(*g*) *Ibid.*

(*h*) *Campbell v. Campbell*, M. 7156.

(*i*) *Seth v. Hain*, 17 D. 1117.

(*k*) *Robertson v. Scott*, 3 July 1834, 12 S. 875.

(*l*) *Wilsons v. Wilson*, *Bee v. Wallace*, *ubi supra*; *Thoirs v. Tolquhoun*, 1686, M. 16305, 16308. See also *Cochrane v. Black*, 1 Feb. 1855, 17 D. 321; *Laird v. Laird*, 26 June 1855, 17 D. 984, as to the principles upon which the accounting is to be made.

rents and other outlay in the management, and for any grassum he may have paid as a consideration for the lease (*a*). It would seem, on the authority of *Wilson's* case, that he is entitled to a reasonable allowance for his labour and attention in the cultivation of the property (*b*).

Purchases of
Debts.

It is a settled point, that a trustee who purchases debts contracted by his constituent, acquires them for behoof of the trust estate (*c*); for, as Lord Campbell said, in the leading case on this subject, it was quite clear that the trustee could not purchase the bond for his own benefit, and that his representatives could not sue upon it for the benefit of his estate; and that the obligor, having offered to pay, or having paid back the purchase money, with interest, the trustee had no further claim (*d*). The rule applies to all persons holding an office or situation of trust; as testamentary trustees (*e*), trustees for creditors (*f*), tutors and guardians (*g*), factors (*h*), agents (*i*), and persons acting as *negotiorum gestor* (*k*). The beneficiary is entitled to all collateral benefits arising from the purchase; and, accordingly, it was found that the legal of an apprising purchased by the trustee could not expire, so as to vest the beneficial right to the trust estate in his person (*l*). And, where a father had included in a trust disposition of his estates, an acre of ground which did not belong to him, but to another relative; and the trustee afterwards obtained a gratuitous disposition from the owner, it was found that the right to the acre in question accresced to the heir (*m*).

Doctrine not
to be qualified
in exceptional
cases.

The position of a trustee purchasing debts is not materially altered, either by reason of the trust being limited to any particular

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| (<i>a</i>) <i>Ludquhairn v. Haddo</i> , M. 9504. | (<i>g</i>) <i>Wright v. Kinloch</i> , 1712, M. 16193. |
| (<i>b</i>) M. 16378; but see <i>Bee v. Wallace</i> , M. 6012 (Kilkerran). | (<i>h</i>) <i>Murray v. Murray</i> , 1710, M. 9504. |
| (<i>c</i>) <i>Stair</i> , 1, 6, 17. | (<i>i</i>) <i>Corsan v. M'Gowan</i> , 1736, M. 9504. |
| (<i>d</i>) <i>Hamilton v. Wright</i> , 18 Mar. 1839, 1 D. 668, rev. 2 Aug. 1842, 1 Bell, 574, 592. | (<i>k</i>) <i>Spreul v. Crawford</i> , 1741, Elchies, Tr., No. 1; Do., Adjudication, No. 30. |
| (<i>e</i>) <i>Maxwell v. Maxwell</i> , 1667, M. 16166. | (<i>l</i>) <i>Ogilvie v. Lyon</i> , 1729, M. 16200. |
| (<i>f</i>) <i>Hamilton v. Wright</i> , <i>supra</i> ; <i>Rae v. Glass</i> , 1673, M. 16170; <i>Ogilvie v. Lyon</i> , 1729, M. 16200; <i>E. of Crawford v. Hepburn</i> , 1767, M. 16208. | (<i>m</i>) <i>Cochrane v. Cochrane</i> , 1732, M. 16339. |

description of property (a); or of the debts in question having been incurred after the constitution of the trust; or of the purchase having been made openly, and with the tacit assent of the beneficiary (b). If the debt purchased is secured by bond, with the usual clause of registration, it is of course incompetent to raise diligence upon such bond, to the effect of recovering the price actually paid (c); though the trustee may recover the amount by action; or may take credit for it in his accounts as money advanced. In this view of his position, there seems to be some room for criticism upon the decision of the Court in the sequel of *Hamilton's* case (d), namely, that the trustee could not set off a sum of L.2000, which he had paid for his constituent's bond—the subject of litigation—in compensation of his constituent's claim for the expenses of the action.

It is interesting to observe, that as early as the case of *Spreul*,^{*Spreul v. Crawford.*} decided in 1741 (e), very accurate notions prevailed as to the nature of constructive trusts. The defender, in that case, having taken upon himself the management of the property of his minor relatives; and having, during the subsistence of that relation, purchased an adjudication over one part of the minors' estate; and also obtained a gratuitous disposition to another portion, the Lords would not entertain a declarator of trust as to the lands *disponed* in fee-simple (though they afterwards reduced the conveyance). But as to the purchase of the adjudications, they had no hesitation in affirming that the statute of 1696 did not apply to trusts of this description. The distinction taken by President Forbes and Arniston did not depend altogether on the circumstance of *Spreul* being a mere *negotiorum gestor*—for an express trustee would equally have been precluded from acquiring debts for his own benefit,—but on the general rule which impresses a fiduciary character upon all transactions, by means of which a party, whether expressly or virtually a trustee, seeks to gain an advantage at the expense of the trust estate.

(a) *Maxwell v. Maxwell*, M. 16166.

(b) *Hamilton v. Wright*, 1 Bell, 591, 592, per Lord Brougham.

(c) *Ibid.*

(d) *Wright's Trs. v. Hamilton*, 7 Dec. 1843, 6 D. 185.

(e) *Spreul v. Crawford*, 1741, Elch. Tr. No. 1; Adjud. No. 30; and see the narrative of this case in *Marshall v. Lyall*, 18 Feb. 1859, 21 D. 521.

Possession of
Title-Deeds as
affected by
Constructive
Trusts.

If in a transaction of loan the agent for the borrower has also an interest in, or has undertaken a liability connected with the subjects disposed in security, he will not be permitted to enforce his lien to the prejudice of the heritable creditors. Thus, in the case of *Allan v. Sawers* (a), the trustees, in consideration of the sum of L.900, assigned to Sawers a heritable bond of the same value, and became bound for the punctual payment of the interest. The property having afterwards been brought to sale, Allan, who had acted as agent for both parties in the loan transaction, and who was also one of the trustees, attempted to enforce his lien against the property; but the Lord Ordinary (Cockburn), the Court adhering, laid down that he could not come forward in his professional character, or use his professional rights to defeat the security on the faith of which he had induced the lender to advance his money (b). "An agent," said Lord Fullerton, "who joins in bonds containing an assignation to the title-deeds, does by the clearest implication depart from any claim of lien on these title-deeds—a claim which can be urged and made effectual only by obstructing the creditor's right, which the agent has bound himself to fortify and make good" (c).

Duty of Agent
acting for
parties having
conflicting In-
terests.

We introduce these cases because they illustrate a principle affirmed by Lord Corehouse in *Wilson v. Lumsdaine* (d), and supported by numerous decisions (e), that an agent who acts for both parties in any onerous transaction is not at liberty to retain the title-deeds as against one of those parties in order to enforce payment of an account due by the other. The principle, as stated by Lord Corehouse, and afterwards adopted by Lord President Boyle (f), was, that "where a man acts in the double capacity of agent for two parties having opposite interests, like a borrower and lender, he incurs serious responsibilities, and it is the duty of the Court to see, as far as possible, that the safety of one or other of his clients is not thereby compromised" (g). And again, in *Gray v. Wardrop*,

(a) *Allan v. Sawers*, 3 June 1842, 4 D. 1356; *Inglis v. Moncrieff*, 7 Feb. 1851, 13 D. 622.

(b) 4 D. 1359.

(c) *Inglis v. Moncrieff*, 13 D. 627.

(d) *Wilson v. Lumsdaine*, 29 June 1837, 15 S. 1211.

(e) *Paterson v. Currie*, 3 July 1846, 8 D. 1005; *Gray v. Wardrop's Trs.*, 21 May 1851, 13 D. 963.

(f) 8 D. 1009; and *Gray v. Wardrop's Trs.*, 21 May 1851, 13 D. 970.

(g) *Wilson v. Lumsdaine*, 29 June 1837, 15 S. 1218.

the Lord President observed, "that when an agent undertakes the solemn duty of acting for both lender and borrower, he must never lose sight of the delicacy of his position, and he is bound to make the fullest disclosure to the lender of everything that can affect the security" (a).

In short, where the law agent for an heritable proprietor has a subsisting lien over the title deeds, it cannot be doubted by any unprejudiced person, that this agent commits a breach of trust if he advises a client to lend his money on the security which he believes he has the power of defeating. But the rule is not limited to the case of a hypothec for accounts previously incurred: it frees the titles from subsequent claims against the lender for accounts incurred by the borrower, provided the bond contains a clause of delivery of writs. In *Paterson v. Currie*, Lord Mackenzie observed, that the titles were then with the agent for behoof of the lender; though, whether his happening to be agent for both parties might have the effect of inducing a double possession, might be doubted (b).

Doctrine applied to Law Agent's lien.

It must be observed, however, that although the borrower's agent communicate directly with the lender, he is not bound to disclose the existing hypothec, unless he has actually undertaken the duty of an agent for both parties (c). If an agent in a loan has lost his lien over the title deeds, by neglecting to make it a matter of special stipulation with the lender, the right in question lapses altogether, and cannot be claimed by the trustee on the agent's sequestrated estate (d).

The ordinary obligation to produce title deeds to parties interested, seems to be more a matter of direct stipulation than of implied trust. It does not occur to us that the power of inspecting such documents can be claimed as a right; unless perhaps by joint proprietors; but of course, a diligence may be obtained where a right is the subject of litigation. A heritable creditor to whom writs have been assigned to the effect of maintaining his right, is not entitled to demand a loan of the titles, until the term of payment has arrived, even to enable him to carry through an assign-

Obligation to exhibit Titles.

(a) 13 D. 970.

(c) *Clark v. Morrison*, 29 Nov. 1837,

(b) *Paterson v. Currie*, 3 July 1846, 16 S. 133.

8 D. 1010.

(d) *Inglis v. Moncreiff*, 7 Feb. 1851, D 13. 622.

ment of the bond (a). On the other hand, it is doubtful whether a creditor to whom title deeds have been delivered as an additional security, may not refuse to produce them to the proprietor, except upon payment of his debts (b). The tendency of the decisions is to support the interests of the party in possession (c).

Constructive
Trusts upon
Policies of In-
surance.

In *Dalglish v. Buchanan* (d) the question was raised, but not determined, whether a tradesman, who has recovered, under a *general* insurance of his stock in trade, etc., including goods "in trust or on commission," is bound to communicate the surplus to his customers, whose goods have been destroyed while in his premises, after appropriating whatever is necessary to compensate his own individual losses. Lord Ivory doubted whether the Insurance Office could be compelled to pay the surplus to the policy-holder, since it was not apparent that the latter had any proper insurable interest in goods in trust or on commission in his premises; and if the company did pay what they were not bound to pay, it would of course be difficult for the owner of the goods to establish any right to such a windfall (e). If the owner's claim in such a case were maintainable at all, we apprehend it could only be stated as raising a constructive trust in the person of the policy-holder (the depository), who, it might be said, was a trustee for the safe delivery of articles sent by his customers for repair, and therefore bound to communicate all advantages incident to the non-performance of that duty.

Duties of Life-
renters.

A liferenter may be considered as being in a certain sense a trustee of the property for the fiar; and, if he commit waste, by unfair leasing, or exhaustion of the subject, he will be liable as for a breach of trust. The same observation may be made touching heirs of entail (f). "I conceive," said Lord Redesdale, "one can scarcely put the situation of an heir of entail, in a Scotch entail, with a power of granting leases, in a higher situation than a trustee. If you consider him a trustee in executing that power, he should so

(a) *Hamilton v. Brown*, 15 May 1839, 1 D. 725.

(b) *Malcolm v. Carmichael*, 9 Mar. 1854, 16 D. 825. Bell's Com., 5th Ed., II. 28.

(c) *Hamilton v. Brown*, *Malcolm v. Carmichael*, *ubi supra*; *M'Neill v. Blair*, 17 Nov. 1835, 14 S. 14; *Dobie*

v. Scales, 19 May 1831, 9 S. 609; *Robertson v. Blackwood's Trs.*, 10 July 1852, 1 Stuart, 490.

(d) 17 Jan. 1854, 16 D. 332.

(e) 16 D. 337.

(f) *Marq. of Queensberry v. Montgomery* (Tinwald case), 26 May 1820, 6 Pat. 551.

execute it as to have regard to the interest of his successor. . . .

If a trustee, in such a situation, had granted leases of this description, though they were really to the prejudice of the succeeding heir of entail, does it follow that damages can be recovered against the estate, and against the trustee, who has acted without an intent to injure the succeeding heir of entail" (a). But his Lordship, as well as Lord Eldon (b), were of opinion, that if leases were renewed at an unreasonably low rent, the heir would be liable in damages. But such a claim will not readily be entertained where no grassum is taken; and the greatest weight will be given to the element of *bona fides* (c).

(a) *Ibid.* p. 567.

(b) 6 Pat. 577.

(c) *Ibid.* And see *Muirhead v. Young*, 13 Feb. 1858, 20 D. 592.

PART II.

OF THE ESTATE AND OFFICE OF TRUSTEE.

CHAPTER XII.

OF THE NATURE AND INCIDENTS OF THE OFFICE OF THE TRUSTEE.

SECTION I.

TRUSTEES CANNOT ENTER INTO TRANSACTIONS IN WHICH THEY HAVE A PERSONAL INTEREST.

TRUST, in the eye of the law, is regarded as a gratuitous office, being in this respect analogous to the civil law contract of mandate (a). At one time this doctrine was applied even to trusts in insolvency (b); but as it has been found by experience that a trust of this nature is best managed by professional persons, bound to give continuous attention to its affairs, it has been usual to stipulate for the remuneration of such trustees by commission; and even in the absence of express stipulation, custom has sanctioned the right to remuneration in this form (c).

Exception in
the case of
Trustees for
Creditors.

By acceptance of the office, a trustee comes under an implied obligation, not only to execute the purposes of the trust fairly and discreetly, but also to maintain a disinterested position in all trans-

Trustee cannot
be Auctor in
rem suam.

(a) See Stair 1, 12, 5; Ersk. 3. 3, 32; Bell's Pr. § 1993. 5. Although not entitled to charge for services performed personally, trustees have, of course, the right to transact the business of the trust through an agent, and

to take credit for the remuneration paid to him (*Hay v. Binny*, 19 Feb. 1861, 23 D. 594).

(b) *Johnston's Tr. v. his Cred.*, 1738, M. 13407; Elch. Tr. No. 6.

(c) Bell's Pr. § 1993. 5.

actions into which he may enter for the benefit of the estate. If the trustee were permitted to enter into transactions in which he might have a conflicting personal interest, it is obvious that the safety and probable success of this mode of carrying out the settlor's intentions would be materially impaired, and the confidence of the public in the security of trust settlements proportionately lessened. For this reason trustees, both in England and Scotland, are held to be absolutely precluded from entering into any personal transactions in which the trust estate has an interest.

Reason of the
Maxim.

The principle, that a trustee cannot be "*auctor in rem suam*," has been variously stated by writers of authority. Thus Mr Lewin (a) says, that there is "a general rule established to keep trustees within the line of their duty, that they shall not derive any personal advantage from the administration of the property committed to their charge." Mr Forsyth, with a clearer idea of its tendency, speaks of "the principle which prevents the trustee from deriving personal benefit from the trust property, or doing anything to place his own interests *in competition* with that of the trust (b). The assumption, that contracts between the trustee and the trust estate were void on account of his being *lucratus* by the transaction, has led to much misconception; and it must be got rid of before we can form a just estimate of the principle in its generality (c). In many cases it is simply impossible to determine whether the terms of the contract have been the best attainable for the interest of the beneficiary. On this ground the Courts have uniformly refused, ever since the decision in the case of the *York Buildings Co.* (d), to allow any question to be raised as to the fairness or unfairness of a contract so entered into. "It is a rule of universal application," said Lord Cranworth, "that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, *or which possibly may conflict*, with the interest of those whom he is bound to protect." Looking to the whole scope of the opinions in this leading decision, as well as to the question actually decided, we think the statement of the principle

(a) Lewin, Tr., 4th Ed. 211.

(b) Forsyth, Tr., p. 116.

(c) *Hamilton v. Wright*, 2 Aug. 1842,
1 Bell, 591, per Lord Brougham.

(d) *York Buildings Co. v. Mackenzie*, *infra*,—per Lord Cranworth in
Aberdeen Raily. Co. v. Blaikie Brothers,
20 July 1854, 1 Macq. 471.

might be even further generalized. Of *all* engagements, in which the trustee (or other functionary having a delegated duty to perform) enters as an individual, into stipulations with himself in his fiduciary character—it may be predicated, that he has a personal interest “conflicting, or which may conflict, with that of the trust.” Hence we deduce the more general rule, that trustees cannot enter into any transaction in which they have a personal interest.

The germ of the principle is contained in the following passage from the Roman Digest:—“Tutor rem pupilli emere non potest: idemque porrigendum est ad similia; id est ad curatores, procuratores, et qui negotia aliena gerunt” (*a*). In the application of the principle there is no difference between the English and Scotch systems of jurisprudence; the decisions of the courts of either country being mutually available for illustration or authority (*b*). We shall now proceed to deduce synthetically the different legal propositions that are comprehended in this general law. Some of the decisions open up extensive fields of inquiry not directly connected with the present subject. These will be afterwards examined; but at present we shall note merely the relations which have been deemed sufficient to give rise to the disqualification.

Civil Law doctrine.

1. A trustee cannot stand in the relation of a purchaser towards the trust. The rule is directed not only against the purchase of trust property by trustees, but is also understood to prohibit the acquisition of collateral rights, as outstanding debts due to the trust (*c*), or property over which the trust holds a security (*d*). The cases are numerous, and embrace transactions between parties in almost all the recognised relations of confidence (*e*).

Trustee cannot purchase an Estate.

2. The trustee cannot contract in the character of a vendor or creditor. Thus, a contract on the part of the trustee to supply the trust with goods is voidable as against him. The Court will not interfere

Trustee cannot contract as Vendor.

(*a*) Lib. XVIII., tit. 1, L. 34, 7; Stair, 1, 6, 17.

(*b*) *Aberdeen Ry. Co. v. Blaikie Brothers*, 1 Macq. 477, per Lord Brougham.

(*c*) *Mackellar v. Balmain*, 8 Mar. 1817, F. C.; *Thorburn v. Martin*, 8 July 1853, 15 D. 845.

(*d*) *Gillies v. MacLachlan's Rep.*, 11 Feb. 1846, 8 D. 487.

(*e*) See *York Buildings Co. v. Mac-*

kenzie, 13 May 1795, 3 Pat. 378; *Jeffrey v. Aiken*, 16 June 1826, 4 S. 722; *Elias v. Black*, 9 July 1856, 18 D. 1225; *Faulds v. Corbet*, 25 Feb. 1859, 21 D. 587; and see also *White & Tudor's Leading Cases in Equity*, 92–142; and cases in this volume, Chapter XVII., Section III. (Trusts for Sale).

either to compel the beneficiary to take delivery, or to enforce payment of the stipulated price, as was found in the case of the *Aberdeen Ry. Co. v. Blaikie* (a). This was the case of a director of a railway company contracting to supply the company with iron; the decision, however, did not turn upon the provisions of the Companies Clauses Act (which merely punishes the director by deprivation of office), but upon the common law principles enunciated above. On the same principle, if a trustee purchase a claim or security for which the trust estate is liable, intending to assign the same to the trust at the full value, he will not be allowed to deal with the estate on that footing; but the purchase will be presumed to have been made for the benefit of the other creditors, or of the beneficiary, as the case may be; and the trustee may be obliged to assign the security, taking credit only for the price actually paid (b). And so a trustee, obtaining abatements or easements in settling the liabilities of the trust, must communicate the benefit to the estate (c).

Trustees can-
not borrow
Trust Money.

3. Trustees ought not to lend money to any of their own body. A loan of trust funds by trustees to a co-trustee on personal security, is at the *personal risk* of the trustees who acquiesce in the transaction (d); and although a loan to a trustee on first-class heritable security as a *bona fide* investment, may not seem so objectionable, no professional adviser would recommend such a transaction in the face of the recent decisions as to sales (e). A trustee taking titles to securities in his own name, and not as trustee, will be held to guarantee the sufficiency of the security (f).

Trustees can-
not take leases.

4. A trustee cannot take a *lease* of the trust estate (g). And, conversely, if the trust estate consist in part of leasehold property,

(a) *Aberdeen Raily. Co. v. Blaikie Brothers*, 20 July 1854, 1 Macq. 461.

(b) *Maxwell v. Maxwell*, 1677, M. 16166; *Rae v. Glass*, 1673, M. 16170; *Ogilvie v. Lyon*, 1729, M. 16200; *Wright v. Wright*, 1712, M. 16193; *E. of Crawford v. Hepburn*, 1767, M. 16208; *Hamilton v. Wright*, 8 Mar. 1839, 1 D. 668, revd. 2 Aug. 1842, 1 Bell 574.

(c) *E. of Northesk v. Carnegie*, 1702, 4 Br. Sup. 529; *Anderson v. Lauder*, 1740, Elch. Tr. No. 10.

(d) *Sym v. Charles' Trs.*, 13 May

1830, 8 S. 741; *Grieve v. Amos' Exrs.*, 24 June 1835, 13 S. 973.

(e) As to loans on heritable security, see *Acc. of Court v. Forsyth*, 28 Jan. 1853, 15 D. 345; *Murray v. Murray*, 30 May 1833, 11 S. 663; *Graham v. Hunter's Trs.*, 4 Mar. 1831, 9 S. 543; *Thomson v. Christie*, 16 June 1852, 1 M'Q. 236.

(f) *Murray v. Borthwick's Trs.*, 1797, M. 3237.

(g) *Ex parte Hughes*, 6 Ves. 617; *Attorney-Gen. v. E. of Clarendon*, 17 Ves. 500.

and the trustee obtain a renewal of the lease in his own name, he will be considered to hold it for behoof of the beneficiaries (a).

5. Trustees are not at liberty to trade with the trust funds. Although a merchant has been appointed testamentary trustee to his partner, without being directed to withdraw his constituent's money from the business, it is his duty as trustee, to do so; and if he retains the money in the concern, he will not be exonerated on paying mercantile interest as for a loan, but will be obliged, in addition, to contribute a share of the profits of the business, commensurate with the proportion which the trust funds may bear to the whole capital embarked in the concern (b). The trustee will also be liable in *solidum* for losses, in the event of the firm becoming bankrupt (c). In like manner, a trustee will be bound to communicate all profits acquired by speculating with the funds of his constituent; e.g., by investments in profitable securities (d), or by purchasing improveable property (e).

Trustees not
allowed to
trade with the
Trust Funds.

6. The beneficiary seems to be entitled to the enjoyment of any personal privilege pertaining to the subjects held in trust. Thus it was expressly found in *Brown v. Johnston*, that minors were entitled to present to a *living* (f); and in two previous cases the right of a minor to present, through a commissioner, was recognised (g). And in *Grindlay v. Drysdale*, the Court, on the report of Lord Moncreiff, ruled that the reverser and not the adjudger should present, during the currency of the legal, on the ground that the possession of the latter must be such as would go to diminish the debt (h). "Although the right of presenting," said Lord Moncreiff, "cannot be valued in money, the very fact that the title is *in commercio*, and still more, the plain sense of the thing, show that one act of presentation may

Right of Pre-
sentation.

(a) *Wilsons v. Wilson*, 1789, M. 16376; *Bee v. Wallace's Exrs.*, 1745, M. 6008, 6011; *Parkhill v. Chalmers*, 1771, M. 16365, affd. 12 Feb. 1773, 2 Pat. 291; and *Keech v. Sandford*, Sel. Ch. C. 61; Wh. & T. Leading Ca. 36-44.

(b) *Cochrane v. Black*, 1 Feb. 1855, 17 D. 321; 16 July 1857, 19 D. 1019; *Laird v. Laird*, 26 June 1855, 17 D. 984.

(c) *Graham v. Keble*, 10 Nov. 1813, 2 Dow, 17; 21 July 1820, 6 Pat. 616.

(d) *Torrie v. Munsie*, 31 May 1832, 10 S. 597.

(e) *Gillies v. MacLachlan*, 11 Feb. 1846, 8 D. 487.

(f) *Brown v. Johnston*, 9 June 1830, 8 S. 902.

(g) *Baillie v. Morrison*, 28 Feb. 1822, 1 S. 404; *Pres. of Inverness v. Fraser*, 10 June 1823, 2 S. 384.

(h) *Grindlay v. Drysdale*, 4 July 1833, 11 S. 896.

really be of more value to the creditor than all his debt. He may thereby provide for a son or other friend who would otherwise be dependent on him. In this way he would get double payment for his debt." These considerations go to prove that the right of presentation is, in law, a *valuable* though not a saleable privilege; and that although in the case of a regular trust the right to present would most probably vest in the trustee (a), he would, notwithstanding, be held bound, as in England, to adopt the nomination of the beneficiary (b).

Privileges of Shooting.

On the same principle, it is clear that the trustee cannot appropriate the privilege of shooting on the trust estate (c). In *Condie v. Macdonald*, it is true, the Court refused to hold a factor personally liable for the value of unlet shootings (d). But it has since been determined that the value of unlet shootings must be taken into account in estimating the total rental over which heirs of entail may grant security for family provisions in virtue of reserved powers, or under the enabling clauses of the various Acts of Parliament (e). In the case of *Menzies v. Menzies* (f), Lord Rutherford observed that the law holds that such rights are not personal privileges only, but valuable accessories to the estate; and "that what may be let, and under ordinary administration is often let, shall, if unlet, be estimated by its value" (f). The principle that the valuable nature of the subject is the criterion of interest, has also been acknowledged by the legislature in Acts relating to taxation. Having regard to usage and to these sources of authority, while it would be too much to say that trustees are bound in every instance to let the entire shootings, even where the trust estate is of great value; we apprehend it would be their duty to let them, in all cases where they were not reserved for the *bona fide* use and enjoyment of the beneficiary.

Cannot be appointed Judicial Factor.

7. A trustee who has declined to accept the appointment, will

(a) See Chapter XV. (Vesting of the Legal Estate).

(b) See Lewin Tr., 4th Ed. 212.

(c) See Eng. cases of *Webb v. E. of Shaftesbury*, 7 Ves. 488; and *Hutchinson v. Morrit*, 3 Y. & C. 547.

(d) *Condie v. Macdonald*, 20 Nov. 1834, 13 S. 65, note.

(e) *Menzies v. Menzies*, 10 Mar. 1852, 14 D. 651; as to let shootings, see *M'Pherson v. M'Pherson*, 24 May 1839, 1 D. 795, aff. 13 Aug. 1846, 5 Bell 280; *Sinclair v. Lord Duffus*, 24 Nov. 1842, 5 D. 174.

(f) 14 D. 664.

not be appointed judicial factor on the trust estate (a). Were the practice otherwise, it would operate as an indirect encouragement to trustees to convert their office into a source of profit. Where a trustee was willing to act in that capacity, but doubts had been suggested by other parties as to the validity of the trust deed in consequence of the settlor having suffered transportation, the Court appointed the trustee judicial factor (b); but in a later case, where an ex-trustee was objected to, the Court conferred the factory upon a neutral person (c). In the exceptional case of a trustee being appointed, it may be doubted whether he could claim commission. All analogy is adverse to such a claim; e.g., where a person qualified to serve as tutor-at-law is made *curator bonis* (d) or factor *loco tutoris* (e), the Court attaches the condition that he must act gratuitously.

8. The office of a trustee is essentially gratuitous, and therefore a trustee who acts as agent to the trust is not entitled to charge, by himself or his partner (f), for his professional labours; though he may recover "costs out of pocket." This principle—which was laid down in the earlier English decisions (g), and in the Scotch cases of *Morrison v. Rennie* (h) and *Flowerdew* (i)—was supposed to have been shaken by Lord Cottenham's ruling in *Cradock v. Pyper* (k). But the authority of that case was denied by Lords Cranworth and Brougham, in *Manson v. Baillie* (l). The question was afterwards argued before all the judges in the Court of Session, and determined as stated above (m). The rule is now understood to extend to all offices of trust, including that of Par-

Not entitled to
Professional
Remuneration.

(a) *Ex parte Pennycook*, 20 Dec. 1851, 14 D. 311.

(b) *Marshall v. Anderson*, 5 June 1841, 3 D. 989.

(c) *M'Culloch v. Forman*, 11 Dec. 1851, 14 D. 311.

(d) *Jackson v. Wright*, 19 June 1835, 13 S. 961.

(e) *Pet. Robertson*, 14 Jan. 1830, 8 S. 435.

(f) *Lord Gray v. Dundas*, and *Broughton v. Broughton*, *infra*.

(g) *Robinson v. Pett*, 3 P. WMS. 249; *New v. Jones*, 1 Hall & Twells, 632.

(h) *Morrison v. Rennie*, 14 July 1847, 9 D. 1483, rev. 26 April 1849, 6 B. 422.

(i) *Pet. Flowerdew's Trs.*, 22 Dec. 1854, 17 D. 263.

(k) *Cradock v. Pyper*, 1 Macn. & Gor. 664.

(l) *Manson v. Baillie*, 19 June 1855, 2 Macq. 82, 91; see *Broughton v. Broughton*, 5 De Gex, Macn. & G. 160.

(m) *Lord Gray v. Dundas*, 12 Nov. 1856—decided 21 June—19 D. 1.

liamentary trustee (a), trustee for creditors (b), judicial factor, and *curator bonis* (c).

Secus if specially employed by Trustee or Beneficiary.

It would seem that the trustee is entitled to act and to charge for professional assistance as against a co-trustee, or beneficiary, when specially employed on that footing (d); or when authorized to act by the trust appointment. And where a deed gives power to trustees "to appoint agents and factors, either of their own number or other fit persons," it was held—Lord Deas dissenting—that the intention to allow remuneration must be presumed (e). "When a party," said Lord President M'Neill, "authorizes the employment by his trustees of one of their own number in one or other of these offices, and does so in the same sentence with which he authorizes the employment of any other person, I have no doubt that he must mean employment in the ordinary sense and signification of that term—in the ordinary way in which persons possessing that character are employed; and that being so, I am clearly of opinion that, in this case, it is competent to the trustees to employ one of their own number with remuneration." And to the same effect Lord Ivory observed, "It was not necessary, if the factor was to exercise his functions gratuitously, that any power should have been given in the deed to the trustees to appoint any of their own number to the office. It has all along been competent to do so, if the office is to be exercised gratuitously" (f).

Remuneration of Tutor *ad litem*.

There is a speciality in the case of a tutor or *curator ad litem*. The very object of such appointments being to secure the services of a professional person competent to attend to the interests of the ward in the particular suit, there is no reason why he should be refused payment for his services (g); and accordingly it has been the practice for tutors *ad litem*, who are law agents, to conduct the cases of their wards personally, or by firms in which they are partners (h).

(a) *Lord Gray v. Dundas*, *supra*.

(b) *Lauder v. Miller*, 15 July 1859, 21 D. 1358; and *Johnston's Cr. v. Johnston's Tr.*, 4 Jan. 1738, reprinted 21 D. 1383.

(c) *Kennedy v. Rutherglen*, 25 Jan. 1860, 22 D. 567; and cases of *Baillie v. Mackenzie*, and *Pet. Douglas*, 21 June 1856, 19 D. 1.

(d) *Lord Gray and Others*, 19 D. 22, per Lord Neaves; 2 Macq. 86, per

Lord Cranworth; and see *Hope v. Hope*, 12 Feb. 1856, 18 D. 585.

(e) *Goodsir v. Carruthers*, 19 June 1858, 20 D. 1141.

(f) 20 D. 1148.

(g) *Pet. Rennie*, 27 June 1849, 11 D. 1201; *Pirrie v. Collie*, 4 Mar. 1851, 13 D. 841.

(h) See *Johnstone v. Beattie*, 29 Jan. 1856, 18 D. 343.

9. The principle of *Home v. Pringle* must be held to prohibit trustees from accepting any salaried or remunerative appointment under the trust, whether as factor, cashier, or otherwise (a). Appointment to Salaried Office.

10. The altered standard of opinions in our own time makes it unnecessary to advert particularly to those cases in which agreements for the payment to trustees of a direct bribe, or "gratification," for mismanaging the trust property, were disallowed (b). Gratification.

Lastly,—there is a legal presumption that no beneficial interest is intended to accrue to trustees; and accordingly a trustee has no resulting or reversionary right in the subjects conveyed to him, in the event of the line of heirs named in the settlement becoming extinct, or the purposes of the trust being fulfilled; but the property will revert to the truster, or his heir-at-law (c); or failing both, to the Crown as *ultimus hæres* (d). Trustee has no resulting interest in the Estate.

SECTION II.

TRUSTEES HOLD A JOINT AND SEVERAL OFFICE WHICH TRANSMITS TO SURVIVORS.

Under the usual style of destination—by which trust property is conveyed to the trustees, the acceptors or acceptor, survivors or survivor of their number—all questions relating to the power of administration are avoided, the office being declared joint both as to acceptance and survivance. But as trust deeds may be occasionally met with in which different forms of destination have been chosen by the settlor, it is necessary to consider the import of the language used in such destinations, with reference to the powers of accepting and surviving trustees.

1. *When a destination to acceptors is implied.*

The first topic of inquiry which will engage our attention, is Different Forms of Nomination.

(a) *Home v. Pringle*, 22 June 1841, 2 Rob. 384; in this case the House would not interfere, as the accounts had been settled; but see *Wellwood's Trs. v. Hill*, 17 Dec. 1856, 19 D. 187.

(b) See *Mor. voce* Pact. Ill. 9455.

(c) *Torrie v. Munsie*, 31 May 1832, 10 S. 597; *Soutar v. M'Grugar*, 22 Jan. 1801, F. C. See Chapter X., *supra*.

(d) *Finnie v. Lords Com. of Treasury*, 30 Nov. 1835, 15 S. 165.

the legal effect of a nomination of a plurality of trustees, where some do and others do not accept. The consequences of a partial acceptance will, of course, depend on the terms of the nomination. All the known modes of nominating a plurality of trustees may be reduced to one or other of the following classes : —(1.) Simple nomination ; (2.) simple nomination with the proviso of a quorum ; (3.) nomination of A., B., and C., and acceptors with the proviso of a quorum ; (4.) nomination of A., B., and C., when A. is declared a *sine quo non* ; (5.) nomination of A., B., and C., and acceptors, A. being a *sine quo non* ; (6.) nomination of A., B., and C., “jointly.” The provisions for continuing the trust to survivors are considered in the second part of the section.

Simple Nomination equivalent to joint and several.

(1. and 2.) When a settlor nominates a plurality of persons as his trustees, without declaring whether the appointment is a joint or a several one, the nomination is said to be simple. It has been doubted whether such an appointment does not fall, in the event of any of the trustees declining to accept ; but the weight of authority is certainly in favour of the doctrine that a simple nomination implies a destination to “acceptors.” If so, then the acceptance of a single trustee ought to be sufficient ; since the appointment must be construed either as a joint or a several one. A simple nomination of tutors vests the office in the acceptors or acceptor (a).

Opinions of Stair, Bell, and Forsyth.

The opinion of Lord Stair would seem to point out a distinction between trusts *inter vivos* and trusts *mortis causa*, which is scarcely consistent with principle. After stating the general rule, that mandatories must concur in the execution of a joint mandate, he says : “It may be objected, that where there are many executors or tutors, without mention of a quorum, the death of one makes not the nomination to cease, nor the death or non-acceptance of some of them ; and, therefore, this being the most important trust, the like must hold in all other cases. It is answered, that the parity holds not ; for the deeds of defuncts in their latter wills are always extended, that the act may stand : but in contracts it is contrary, where words are interpreted more strictly ; and, in this case, the difference is clear, that a mandate *inter vivos* giving power, it is strictly to be interpreted, because the power failing, returns from the mandator (a) Stair, 1, 6, 14 ; Ersk. 1, 7, 30 ; 2 Fraser, Pers. Rel. 78, and cases there cited.

to the mandant himself; but a power given by a defunct in contemplation of death, cannot return, and therefore the defunct is presumed to prefer all the persons nominate to any other that may fall by course of law" (a). Professor Bell, whose opinion was probably influenced by English analogies, held the presumption in indefinite appointments to be, that the trustees are intended to act jointly, and that the confidence of the truster is reposed in them only while they continue together (b). It appears, however, that Bell considered that the consequences were precisely the same, whether the failure to act arose from death or non-acceptance. Mr Forsyth's opinion appears to be, that, where any limitation of the number of the trustees is expressed,—as, for example, by adjecting a destination to survivors, or by limiting a quorum,—then the presumption for a joint appointment was taken away; and that the other alternative would be presumed, namely, that of a joint and several appointment, under which the trust would subsist if a single trustee accepted. This view is supported by the case of *Halley v. Gowans*,
Halley v. Gowans. where a trust disposition for behoof of creditors was granted to six persons named, "and the survivors or survivor of them, declaring any two of them a quorum, as trustees," and a reduction of the trust was brought on the ground that only three trustees had accepted. The Court found "That the said trust disposition did not fall or lapse by the non-acceptance of a part of the trustees, but that the acts and deeds of a *quorum* of those who accepted and acted were valid in the ordinary administration of the trust, if not challengeable on the ground of *mala fides*, malversation, or on any other ground that would have been relevant against the whole disponees named, if they had accepted" (c). In this case, it will be seen that the Court disregarded Lord Stair's distinction as between testamentary trusts and mandates *inter vivos*. The proviso of a quorum was considered important, as showing that the makers of the deed did not contemplate having the concurrence of all the trustees; but the judges seem also to have discountenanced the notion that a simple nomination necessitated the acceptances of the whole body. Thus

(a) Stair, 1, 12, 13.

(c) *Halley v. Gowans*, 20 Feb. 1840,

(b) Bell's Pr. § 1993; Com. 6th Ed. 2 D. 623.

847. (The passage referred to is not in the last quarto edition.)

Lord Cunninghame (Ordinary) says in his note (a): "When a party in Scotland has it in view to constitute a trust, such as the pursuers allege that they meant the present to be, it is incumbent on him either to make any favoured nominee, in whom he places any peculiar reliance, a *sine qua non*, or so to constitute his trust as to give the nominees the power only of acting jointly. See the cases of *Drummond*, *Ellis*, and *Huntly* (b). But the right of the accepting trustees is still more clear when a quorum is specified in the trust deed. The acceptance of that quorum has always been held sufficient to preserve the trust. See the case of *Ramsay* (c), and of *Campbell v. Lord Monzie* (d), in both of which it was assumed that the nomination of a quorum would have preserved the trust." Lord Gillies said, it was the doctrine of law and of common sense, that where a quorum of trustees is named, and that quorum accepts and acts, the trust cannot be held to have lapsed by non-acceptance. And Lord Mackenzie said, it was impossible to believe it to have been the intention of the parties to the trust, that if any *one* of the nominees should not accept, the whole was to fall and become abortive. The cases cited by Lord Cunninghame relate to the appointment of tutors; and if that analogy may be relied on, there can be no doubt that a simple nomination implies a several, and not a joint appointment.

Opinion of
Lord Ivory.

To the same effect, we have the opinion of Lord Ivory. A mandate, he says, "will generally fall by the death of any *one*. But this rule holds only in mandates *inter vivos*; for in the appointment of tutors and curators, of managers of a mortification, or of any other testamentary trustees, unless the administration be *expressly* declared to be *joint*, the right to act does not fall by the death or non-acceptance of one or more of the indefinite number (e)." The cases of *Findlay* (f) and *Gordon's Trs. v. Eglinton* (g), deciding that a simple nomination implies the right of survivorship, have an important bearing on this question: first, because survivorship is

(a) 2 D. 629.

(b) *Drummond v. Feuars of Bothkennel*, 1671, M. 14694; *Elleis v. Scot*, 1672, M. 14695; *Marq. of Montrose v. Tutors*, 1688, M. 14697.

(c) *Ramsay v. Maxwell*, 1672, M. 14695.

(d) *Campbell v. Lord Monzie*, 1752, M. 14703.

(e) Iv. Ersk. 662, note.

(f) *Pet. Findlay*, 29 June 1855, 17 D. 1014.

(g) *Gordon's Trs. v. Eglinton*, 17 July 1851, 13 D. 1981.

inconsistent with the hypothesis of a *joint* nomination ; and secondly, on account of the principle of the decisions, which is founded on the presumed will of the deceased, agreeably to the doctrine enunciated in the concluding words of our quotation from Lord Stair (*a*), and which is generally applicable to all cases of failure of trustees, whether by death or non-acceptance.

In a recent case, the Second Division declined to appoint a judicial factor on the ground that the trust had fallen by the non-acceptance of one of two trustees. The destination was to A. and B., and the survivor of them, and to persons assumed to act along with, or in succession to them. The application was opposed by the accepting trustee, and the Court gave no opinion on the merits, but superseded consideration of the petition, to allow the petitioners to bring a declarator that the trust had fallen (*b*).

The law of England, which gives less latitude than our own to individual action among trustees (*e.g.*, requiring the concurrence of every accepting trustee to all acts of administration), acknowledges the right of the continuing trustee to administer the trust alone where the other trustees have disclaimed or resigned. The settlor, it is said, must be presumed to know what would be the legal consequences of the death or disclaimer of some of the trustees. And when the disclaimer has been executed, it operates retrospectively, and makes the other trustee the sole trustee *ab initio* (*c*). Thus the general tenor of the authorities, both English and Scotch, seems to show that a simple nomination will be effectual though only one trustee accept ; but that where a quorum is mentioned, the nomination will fail, unless a quorum of those appointed are willing to accept. Where a definite number is required to form a quorum, it is obviously impossible to continue the trust, unless that number accept and survive (*d*).

Doctrine of
the Law of
England.

3. Under a nomination in favour of A., B., and C., and the acceptors or acceptor of them, it is immaterial, as regards the subsistence of the trust, whether a quorum is appointed or not. The trust will subsist if a single trustee accept ; the provision as to a quorum

Proviso as to
Quorum does
not affect
Title of sole
Acceptor.

(*a*) Stair, 1, 12, 13.

(*c*) See Lewin, Tr., 4th Ed. 154,
and cases there cited.

(*b*) *Seton v. Seton*, 28 Nov. 1855, 18
D. 117.

(*d*) *Ireland v. Glass*, 18 May 1833,
11 S. 626.

necessarily becoming inoperative when the number of the trustees is less than three.

Effect of appointment of a *sine qua non*.

4 and 5. One or more persons may be selected out of a plurality of trustees, without whose consent no act of administration shall be effectual. Such a person is accordingly called a *sine qua non*. The utility of making an arrangement of this nature may be doubted. The practical effect of it is the same as that of a joint appointment of two—a most inconvenient arrangement; because the collective vote of the majority of the trustees is neutralized by the single vote of the *sine qua non*; and in the event of a difference of opinion arising between the *sine qua non* and the other trustees, the affairs of the trust must come to a dead lock, neither party having the power of enforcing its views. At present, however, we are dealing only with the effect of a partial acceptance under such an appointment. It has been said (a), on the authority of an old decision (b), that the appointment falls, if all except the *sine qua non* have disclaimed. But although Mr Fraser's opinion is entitled to considerable weight, we think that in this instance it is erroneous.

Does the declination of the *sine qua non* create a lapse?

The ordinary rule is, as stated, that a single trustee not specially favoured, is entitled to carry on the trust on the failure of his colleagues, for it cannot be maintained that a trustee is *disqualified* from continuing the trust, by reason of the trustor having reposed a higher degree of confidence in him, than in any of his co-trustees. Again, it was once supposed that the disclaimer of the *sine qua non* nullified the appointment, although the other nominees might be willing to accept (c). But the more correct view appears to be, that the right of veto is a personal privilege conferred on the trustee in the event of his acceptance; and therefore, if he decline, the trust may be administered by a quorum of the other trustees in the ordinary way (d). This is in conformity with the later tutory cases; e.g., *Scott v. Scott* (e), *Drummore v.*

(a) 2 Fraser, Pers. Rel. 80.

(b) *Primrose v. Ramsay*, 1715, M. 16395; see also *Blair v. Ramsay*, 1735, M. 14702, 5 Sup. 633.

(c) Pet. *Kinnaird*, 1680, 3 Sup. 343; *Ramsay v. Maxwell*, 1672, M. 14695, 2 Sup. 617; *Marquis of Montrose v. His Tutors*, 1698, M. 14697;

Johnston v. Crawford, 1751, Elch. Tutor, 23. These cases all relate to tutory.

(d) *Forbes v. Earl of Galloway's Trs.*, 2 Feb. 1808, F. C., aff. 31 May 1808, 5 Pat. 226.

(e) *Scott v. Scott*, 1775, M. 16371, 5 Sup. 633.

Somervil (a), *Sinclair v. Sutherland (b)*. This construction applies even more obviously where the appointment is expressly limited to the acceptors or acceptor (*c*).

6. Where the trust is committed to two or more trustees "jointly," all must accept, survive, act, and concur, in order to fulfil the trust, each individual being in effect a *sine qua non (d)*. But to warrant so strict an interpretation, the appointment must be expressly stated to be joint; as it was very distinctly put in a case of tutory reported by Kilkerran: "where A. and B. are appointed tutors, without expressing them to be joint tutors, though one of them should not accept the office, it would subsist with the other; for, to make a joint nomination, it must be expressed that they are to be joint tutors" (*e*). In practice, it is unusual to make joint appointments of trustees.

Joint Convey-
ance.

2. When a Destination to Survivors is implied.

A simple destination to trustees vests the estate and office in the accepting trustees *jointly*, so that the right accrues to survivors. The doctrine of accrescion, which we have borrowed from the civil law, assumes that the settlor, in calling two parties, means to indicate a wish that either of them should take the whole subject in preference to any third party not called (*f*). This presumption seems to apply with a peculiar significance to the case of a joint nomination or conveyance in trust; and accordingly a distinction has always been taken between destinations in trust, and joint mandates, which expire on the death of the mandant. In the case of a joint appointment of tutors-nominate, Stair lays it down, that the office survives (*g*); and accordingly, where the office of tutors and curators was conferred upon two persons, whom failing upon certain others, it was held that the substitution did not take effect by the death of one of the persons nominated in the first instance (*h*).

General Rule as
to Accrescion.

(a) *Drummore v. Somervil*, 1742, M. 14703.

(b) *Sinclair v. Sutherland*, 1777, 5 Sup. 634, Hailes, 752.

(c) *Forbes v. Galloway's Trs.*, *supra*.

(d) Stair, 1, 12, 13; Ersk. 3, 3, 34.

(e) *Young v. Watson*, 1740, M. 16346; Bell's Pr. § 1993-5; *Stodart*, 30 June 1812, F. C.

(f) Poth. Ed. Dupin, VII. 392. See Stair, 3, 8, 59 & 79; *Wright's Ezrs. v. Robertson*, 27 Jur. 341.

(g) Stair, 1, 6, 14.

(h) *Children of Duncan Fisher v. their Tutors & Curators*, 1758, M. 16361.

Erskine expressly states, that the office continues in the person of the last survivor, adding, "For though, in deeds *inter vivos*, e.g., mandates where two or more mandatories are named in general terms, they are understood to be named jointly; yet the favour of last wills, and of minority, creates a presumption that the father or minor prefers any one of the tutors or curators so named to those who are pointed out by the law" (a). From this passage we may infer that a disposition in trust to "A. and B. jointly," would, according to Erskine's view of the term, exclude the right of survivorship, contrary to the rule of construction which has hitherto obtained in the interpretation of beneficial dispositions.

Survivorship
does not hold
in appointment
of Tutors.

The doctrine of accrescion in joint appointments of this nature being rested entirely on a consideration of the *dilectus personæ* on the part of the testator, it will not avail to keep alive an appointment of *tutors-dative* after the death of one of their number (b). This principle may now be considered as fixed by the decision of the House of Lords in *Scot's* case, overruling an almost unanimous judgment of the Court of Session. Now that the appointment of *tutors-dative* is vested in the Court of Session (by 19 & 20 Vict. cap. 56, § 19), under the same forms of procedure as are applicable to other appointments under the Pupils Protection Act, it may fairly be assumed, that the rule thus laid down in reference to joint tutors will extend to joint appointments made by virtue of the *nobile officium* of the Court of Session. A similar rule is recognised in practice in England; testamentary guardianship there continuing in the person of the survivors (c); whereas, if the appointment has come from the Court of Chancery, the office determines on the death of any of the guardians (d).

Survivorship
implied in
Conveyances
to Trustees.

Reasoning from the analogous cases of tutory and curatory, Mr Forsyth, in 1844, indicated an opinion that survivorship should be held to be an implied condition in trusts (e). He appears to have considered that, in those cases at least where a certain number of trustees is declared to be a *quorum*, the trust should endure so long as a quorum can be got to act, notwithstanding the failure of some of

(a) Ersk. 1, 7, 30.

(d) *Bradshaw*, 1 Russ. 528; *Hall v.*

(b) *Scot v. Stewart*, 7 April 1834, 7 W. & S. 211, reversing 7 S. 330.

Jones, 2 Sim, 41.

(c) *Eyre v. Countess of Shaftesbury*, 2 P. W. 102.

(e) Forsyth, Tr. 186 *et seq.*

the trustees by death or non-acceptance. The question was afterwards considered by the judges of the Second Division, in the case of *Gordon's Trustees v. Eglinton (a)*. A trust disposition and settlement having been executed, conveying property to certain trustees, and to the survivors or survivor, it was afterwards altered by a codicil, wherein certain other persons were nominated trustees, but without any provision respecting survivance. The trustees made up a title by disposition from the heir-at-law in favour of themselves as trustees, and their heirs and assignees. It was held that the destination in the codicil, and, *a fortiori*, the destination in the conveyance by the heir-at-law, must be construed with reference to the original deed; and, therefore, that the original destination in favour of surviving trustees must be held as implied in subsequent transmissions. Hence the surviving trustee was *in titulo* to sell the estate and to grant a valid disposition. But, further, the Lord Justice-Clerk Hope, delivering the opinion of the Court, gave a general sanction to the doctrine of survivorship in trusts. "On a more general ground," he said, "I apprehend it to be quite clear that a conveyance to trustees, whether in the truster's own grant in a *mortis causa* deed, or in any conveyance in fulfilment of his deed, is a grant, when it is not otherwise expressed, to the trustees, whatever may be their number, and does not fall by the death of one of them. It is said some doubts have recently been thrown on this point. Such doubts are quite unsound, and against the first principle on which such trusts are construed. The true principle is stated by Stair, and admits of no doubt. So long as one of the trustees is alive the trust subsists, and the powers can be competently exercised by that trustee." Lord Cockburn thought this point "not free from doubt" (b).

Reason of the
doctrine.

In the subsequent case of *Findlay*, an application by a surviving trustee for the appointment of a factor, on the ground that the appointment was a joint one, and did not contain a destination to survivors, was refused by the First Division; the Lord President (Lord Colonsay) observing, "I think that in a testamentary deed, in which trustees are appointed, the condition of survivorship is implied, on the principle that a truster prefers that any one of the trustees nominated

(a) *Gordon's Trs. v. Eglinton*, 17 (b) 13 D. 1385.
July 1851, 13 D. 1381.

should manage the estate rather than a judicial factor" (a). In England, where the law of survivorship in trusts has been long established, the same explanation has been given of the principle; and, accordingly, the Courts have discountenanced all attempts to abridge the generality of its application (b). Thus the deeds of a surviving trustee will be upheld, notwithstanding that the trust is of a discretionary nature, and although a power of appointing new trustees has not been exercised; and even when the last surviving trustee is a married woman (c).

Survivorship includes the Survivors of the accepting Trustees.

In practice, it has been usual in Scotland to exclude any questions as to survivorship, by extending the destination in the trust deed to the survivors or survivor of the accepting trustees; and where a quorum is appointed, it is provided as a general rule, and one that it is desirable to observe, that the major number surviving and accepting from time to time shall form a quorum. Where the destination is not so expressed—*e. g.*, where the trust deed declares simply that a majority of *accepting* trustees shall be a quorum—it may be asked whether a majority of the survivors of the accepting trustees would be sufficient? We think it would; on the ground that the nomination is not joint; and that upon the death or resignation of a trustee he ceases to be an accepting trustee, because he is no longer a trustee at all (d).

We may add, that when the authority of acting trustees comes to rest on the mere implied condition of survivorship, it is desirable, if possible, to obtain the consent of the whole surviving trustees to all important acts of administration, where their number has been reduced below that of the quorum limited in the deed of settlement. In the event, therefore, of a trustee refusing, in such circumstances, to concur with his colleagues in necessary acts of administration, they might find it necessary for their own security to raise an action

(a) Pet. *Findlay & Ors.*, 30 June 1855, 17 D. 1014.

(b) Per Vice-Chancellor Wood in *Lane v. Debenham*, 17 Jur. 1005. "If I were to lay down such a rule," he observed, "it would come to this,—that wherever an estate was vested in two or more trustees to raise a sum by sale or mortgage, you must come to the Court on the death of one of the

trustees." And the survivor may sue the solicitor to the trust for an accounting, without making the representative of the deceased trustee a party (*Slater v. Wheeler*, 9 Sim. 156).

(c) Lewin, Tr., 4th Ed. 199.

(d) But see *Blisset's Trs. v. Hope's Trs.*, 7 Feb. 1854, 16 D. 482, and cases cited below, as to powers of a majority or quorum.

to compel him to perform his duty, as was done in *Lynedoch v. Ouchterlony* (a).

It would seem that the office of executor also survives. In the ordinary case of a simple or several appointment of executors-nominate, this proposition is merely a particular case of survivance amongst testamentary trustees, executors-nominate being in the strictest sense trustees (b). It would be more correct to say that the doctrine has been extended from the case of executors to trustees generally; for Lord Stair affirmed, both on principle and authority, that the office of executry descends to survivors. Distinguishing between the case of a joint authority and a nomination of executors or tutors, without mention of a quorum, he says, "A mandate, *inter vivos*, giving power, it is strictly to be interpreted; because the power failing, it returns from the mandator to the mandant himself; but a power given by a defunct in contemplation of death cannot return; and, therefore, the defunct is presumed to prefer all the persons nominate to any other that may fall by course of law" (c).

Survivorship
in Executry.

The reasons given for Lord Stair's opinion, and for the judgment in *Findlay's* case, quoted above, are inapplicable to the case of executors-dative; and the decision of the House of Lords, refusing to extend the principle of survivorship to tutors-dative, naturally tends to throw doubt on the title of surviving executors-dative. That this office does survive, is, however, the preferable opinion, as we shall immediately show. Tutors-dative, it may be observed, not only derive no authority from the will of the testator, but they have not even a vested interest in the property which they manage; whereas executors-dative may be the actual proprietors—burdened by the trust—of the deceased person's estate, and must continue in possession until divested of the fee by one or other of the known modes of transmission. The distinction pointed at has been recognised in the law of England, according to which the right of executorship and administrators survives, as being an authority coupled with an interest—while the committees of a lunatic's estate, who have but a limited authority, retain the office only during their

Whether the
principle ex-
tends to the
case of Execu-
tors-dative.

(a) *Lynedoch v. Ouchterlony*, 20 Nov. 1832, 11 S. 60; see also *Adie v. Mitchell*, 19 Dec. 1835, 14 S. 185.

(b) Bell's Prin. § 1899.

(c) Stair, 1, 12, 13; 3, 8, 59 and 79.

joint lives (a). Such being the law of England and Ireland, the results of establishing an opposite doctrine in Scotland would be anomalous and inconvenient. The effect of the Confirmation of Executors Act, 1858, is to amalgamate the offices of executor and administrator in the different parts of the United Kingdom, and to facilitate the administration of the entire personalty as one estate. With this object, it has been provided that a confirmation, registered in the Court of Probate, shall have the like force and effect as if probate or letters of administration had been granted; from which it would follow, that, if the decree of confirmation were to become inoperative in Scotland—by reason of the death of one of the executors—it must still subsist as a title to the surviving executor in England and Ireland, although utterly nugatory within the jurisdiction in which it was granted. Another reason for believing that the office of executor-dative survives is, that the surviving executor must still be preferable, according to the rules of succession, to all other competitors. We may add, that in many cases there would be room for the plea of *dilectus personæ*, as, for instance, where confirmation has been obtained by legatees or trust-disponees not expressly nominated executors.

Failure of
Trustees.

The administrative machinery of a trust may be stopped by the accidental reduction of the acting staff below the minimum number allowed by the deed; by the failure of a party expressly constituted a *sine qua non*; by bankruptcy, etc. In such circumstances the trust may be wound up by the Court, acting through a judicial factor (b).

SECTION III.

TRUSTEES ACT BY A MAJORITY.

Rule peculiar
to Scotland.

We have seen that the concurrence of all the trustees is requisite to every act of administration, only when they are appointed

(a) Lewin, Tr., 4th Ed. 198; *Hudson v. Hudson* (Rep. t. Talb. 129).

(b) Bell's Com. I. 31; Pr. § 1993, 3 and 5; and see *infra*, Chapter XIV.

Section II. as to the cases where authority has been given to a sole acting trustee to wind up, in the absence of his colleagues.

"jointly." This is the rule of the English law as regards all private trusts (a); but in Scotland, trustees, like jurymen, are supposed to be capable of arriving collectively at a sound conclusion, notwithstanding differences of individual opinion. Accordingly, a simple or indefinite nomination is qualified by the implied condition that the resolution of the majority binds the whole body in all matters of ordinary administration.

By the 1st section of the Trustee Act, 1861, it is enacted that all trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated, shall be held, unless the contrary be expressed, to include a provision that the majority of the trustees accepting and surviving shall be a quorum (b). The enactment in question, however, does not relieve us from the necessity of investigating the common law powers of trustees to act by a quorum, for it is more than doubtful whether the provisions of the Act can be held to apply to subsisting trusts. As regards the action of trustees by resolution of a majority, it is easy to show that the statute is merely declaratory of the common law rule of administration.

Statutory Provision as to Quorum.

The earlier authorities are not very definite, nor quite consistent. Lord Stair affirms that co-executors cannot pursue unless "concurring or called;" adding, however, that "if any of the executors confirmed will not concur and contribute equal pains and expense, the pursuit will be sustained without him" (c). In an early case, where the testator "settles the remainder of her goods, etc., upon her executors after-named, to be applied and disposed of in such manner as the survivors or survivor of them shall think fit, and nominates A., B., and C., executors of this her last will and testament," action was sustained at the instance of a majority of the executors (d); and it had been previously held that one executor could not do diligence on a bond, "except all the rest should either concur in the pursuit or else should refuse to assist, and that they were excluded from their office" (e). Erskine lays down the principle, that executors hold office *pro indiviso* (f); but in the chapter on Manda-

Whether Executors can act by a majority.

(a) Lewin, Tr., 4th Ed. 197.

(b) 24 & 25 Vict. cap. 84, § 1.

(c) Stair, 3, 8, 58.

(d) *Grant v. Campbell's Reps.*,

1764, M. 14690; overruling *Inglis v. Mirrie*, 1738, M. 14690.

(e) — *v. L. Lag*, 1634, M. 14689; and see *Hamilton*, 1685, M. 14686.

(f) Ersk. 3, 9, 40.

tories he says that the rule "ought not to be rigorously extended to steps taken by a lesser number, in points consisting merely in form, or to such acts as are a necessary consequence of what had been before resolved at a full meeting" (a).

In case of
Trustees, a ma-
jority suffi-
cient.

It is not therefore quite clear whether our law, as now administered, recognises any difference between trustees and executors as regards the right of acting by a majority. In the case of trustees who are also executors, there is no longer any room for doubt as to the common law right of the majority to execute the trust. Accordingly, where three gentlemen were made trustees for appointing to a bursary, and an appointment was made by two of their number, the Court held, "That the nomination being indefinite, the majority were entitled to act in the necessary absence of the other examiner" (b). And in the more recent cases of *M'Culloch v. Wallace* (c), and *Blisset's Trustees v. Hope's Trustees* (d), the Court unanimously found that a majority of accepting trustees had a title to pursue actions on behalf of the trust, although no quorum was specified. In the last case, Lord Rutherford observed, "Under a trust of this nature, which gives the trust not only to the persons named generally, but to the acceptors or survivors of them, I have no doubt that implies power in the majority to act, but especially against one of their own number who is recusant" (e). A voluntary association or committee is also entitled to act by a majority (f).

Executors may
sue separately
for their
share of the
Succession.

And executors not clothed with the powers of trustees are entitled to sue separately for their own shares.

Thus, in *M'Target's* case, it was held that an executor-nominate was entitled to sue the representatives of another executor for his share of the succession; and this, although a third executor, who had not intromitted, refused his concurrence (g). In *Rogerson v. Barker* (h), an action of count and reckoning was raised by six co-executors against a partner of the deceased; and two of them having after-

(a) Ersk. 3, 3, 34.

(b) *Campbell v. M'Intyre*, 12 June 1824, 3 S. 126.

(c) *M'Culloch v. Wallace*, 12 Nov. 1846, 9 D. 32.

(d) *Blisset's Trs. v. Hope's Trs.*, 7 Feb. 1854. 16 D. 482.

(e) 16 D. 485.

(f) *Fife & Kinross Ry. Co. v. Deas*, 4 Jan. 1859, 21 D. 187.

(g) *M'Target v. M'Target*, 12 May 1829, 7 S. 591, explained by Lord Medwyn in *Torrance v. Bryson*, *infra*.

(h) *Rogerson v. Barker*, 9 Mar. 1833 (heard 27 Feb.), 11 S. 563.

wards executed a disposition *omnium bonorum*, on the motion of the defenders the action was dismissed, in so far as the bankrupt executors were concerned. An objection having been afterwards taken, that the title of the four continuing executors was bad, in respect that it was necessary for the whole body of original executors to sue collectively, Lord Corehouse, after advising with the Court, repelled the objection. Lord Medwyn, commenting on this case, said that the circumstance that the action was originally raised in the names of the bankrupt executors, was immaterial, and that the decision would have been the same if these two had been denuded of their right (by the disposition) before action was raised, and they and their trustees had refused to concur (*a*). And in *Torrance v. Bryson* (*b*), in which the previous authorities were carefully considered, the right of one out of a plurality of executors to sue his co-executor for his share of the succession was unanimously affirmed; Lords Moncreiff and Medwyn holding that he might have sued a stranger to the same extent, in the event of his co-executors refusing to concur. But it has never been decided that a limited number, being a majority, of the executors can sue for the *whole* debt; though it would obviously be expedient to establish this as a rule applicable both to trustees and executors, seeing that in practice the two offices are almost invariably conjoined.

Where no quorum is named, it rather appears that acts of extraordinary administration, as the alienation or ultimate distribution of the whole trust estate (*c*) will not be valid without the concurrence of all the accepting trustees. When the number of the trustees is reduced to two, it is obvious that both must concur in everything, as the trust then practically resolves into a joint appointment (*d*).

Concurrence of whole body, if requisite to acts of extraordinary administration.

(*a*) *Vide* 4 D. 74, in *Torrance v. Bryson*, *infra*.

(*b*) *Torrance v. Bryson*, 24 Nov. 1841, 4 D. 71.

(*c*) *Ersk. supra*; *Freen v. Beveridge*, 28 June 1832, 10 S. 727; but see observations of Lord Pr. M'Neill on this case in *Blisset's Trs. v. Hope's Trs.*, *supra*; *Pet. Wylie*, 28 June 1850, 12 D. 1110; *Scott v. Reid*, 16 Feb. 1822, 1 S. 332.

(*d*) *Moffat v. Robertson*, 31 Jan. 1834, 12 S. 376, per Lord Corehouse.

In England the consent of the whole body of trustees appears to be requisite to all acts of administration, even to the authentication of receipts, unless special powers are conferred on the majority (*Hall v. Franck*, 11 Beav. 519, 18 L. J. Ch. 364, where, however, the objection was that the receipt was signed by one only of *two* co-trustees). But trustees for charitable or public trusts may act by a majority (*Lewin, Tr.*, 4th Ed. 197).

Powers of a
Quorum.

Where a quorum is provided for, it is necessary that the required number should not only attend the meetings, but also consent to the acts of the trustees (*a*). A quorum may consist either of a fixed proportion of the trustees—usually a majority—or of a definite number. In the former case, it is understood that a majority of the accepting and acting trustees, although less than a majority of those nominated, constitutes a quorum; but to prevent disputes, the provision is usually so expressed in the settlement. In an action in which two of the accepting trustees were called as defenders, it was held that a majority of the remainder were entitled to sue as trustees (*b*). Where the quorum consists of a definite number, as three, and only two survive, the Court will appoint a factor (*c*). And where only a quorum of three remained, and they differed, action was sustained at the instance of *two* against the recusant trustee, to compel him to concur in signing a discharge; the Court holding that the trustee was bound to submit to the will of the majority, unless he had conceived the loan to be an improper transaction, in which case he ought to have complained to the Court (*d*). A declaration that the majority shall form a quorum, does not prevent the trust continuing in the persons of two trustees (*e*), who in that case must act jointly (*f*), or even in the person of a sole accepting or surviving trustee.

Whether
Quorum suffi-
cient for all
purposes.

It has been doubted whether acts of extraordinary administration, as the exercise of a power of sale, are valid when executed by a majority, even when the trust deed declares the majority to be a quorum (*g*). When, as in the Bankruptcy Act, the consent of a majority in number and value of the creditors is required to validate a transaction, the proviso will be strictly enforced; and so the Court has reduced a trustee's certificate for the bankrupt's discharge, because the signature of one of the parties whose consent was

(*a*) *Bell's Pr.*, *ut supra*; *Lynedoch v. Ouchterlony*, 15 Feb. 1827, 5 S. 358. As to powers of a quorum of tutors, see *Fraser*, *Pers. Rel.* 102, and cases there cited.

(*b*) *Shanks v. Aitken*, 4 Mar. 1830, 8 S. 639.

(*c*) *Ireland v. Glass*, 18 May 1833, 11 S. 626.

(*d*) *Lynedoch v. Ouchterlony*, *supra*.

See *Cumming v. Hay*, 28 Feb. 1834, 12 S. 508; and Lord Wood's opinion in *Logan v. Meiklejohn*, 5 D. 1072.

(*e*) *Laird v. Miln*, 7 Dec. 1833, 12 S. 187.

(*f*) *Heriot's Trs. v. Fyffe*, 8 Mar. 1836, 14 S. 670.

(*g*) *Scott v. Reid*, 16 Feb. 1822, 1 S. 332, where a bill was passed to try the question.

necessary to make up the statutory majority had not been adhibited to the concurrence (a).

Although no act or proceeding of the trustees collectively can be valid unless assented to by at least a majority of their number, it is equally clear that a minority, or one of two joint trustees, are entitled to raise actions in their character as individual trustees, where this is necessary either for the protection of the estate or for their own exoneration (b). As an example of the first class of cases, we may mention that of *Reid v. Maxwell* (c), where the Court passed a note of suspension and interdict at the instance of a minority of trustees, to prevent the majority from carrying into effect a resolution passed at a meeting of trustees, by which they proposed to assume additional trustees, and which, it was alleged, was objectionable and had been brought about by unfair means and concealment. And in the case of *Taylor v. Noble* (d), it was found that one of two joint trustees was entitled to raise a multipoleinding in the name of both, and to insist therein to the effect of obtaining his own exoneration. But after a majority of trustees, by whom an action has been raised on behalf of the trust, agree to abandon the suit, an individual trustee is not entitled to insist in it to the extent of his own interest under the trust; though his right to raise a separate action may be reserved (e).

Minority may defend themselves and protect the Estate.

When a corporation is associated with other parties in the management of a charity, it may be doubted whether the corporation, being a distinct person in law, is entitled to more than a single collective vote. In such cases, the Court will not interfere with the established custom of voting, if it is of long standing. So it was decided where the usage had been for "the minister and remanent members of the kirk-session" to vote collectively, under a destination to them and certain individuals (f). But where the destination is to the heritors, minister, and kirk-session of a parish, each individual is entitled to a separate vote; because a parish is

Corporation, whether the Members vote singly or collectively.

(a) *Wylie & Lochhead v. Young*, 24 Feb. 1859, 21 D. 577.

(d) *Taylor v. Noble*, 24 Nov. 1836, 14 S. 818.

(b) *Scott v. Reid*, and *Logan v. Meiklejohn*, *supra*; *Blisset's Trs. v. Hope's Trs.*, 16 D. 482.

(e) *Coulter v. Forrester*, 11 June 1823, 2 S. 387.

(c) *Reid v. Maxwell*, 6 Feb. 1852, 14 D. 449.

(f) *Halden v. Rhymer*, 1707, M. 2387; *Pet. Leslie*, 9 June 1814, F. C.

itself a corporation, of which the minister and kirk-session are individual members (a). And where money was bequeathed to a *district* of a parish, to be under the management of the patrons or overseers of the poor of said *place*, it was held, notwithstanding an adverse usage of eighty years, that the heritors of the whole parish were entitled to a joint management along with the kirk-session, and not merely the heritors of the particular district (b).

Trust not
affected by
change in Con-
stitution of
Corporation.

Where the management is vested in the individual members of a corporation, in conjunction with other parties, and the constitution of the corporation is afterwards changed, or the number of the corporators increased,—the right of acting and voting will continue with the whole members of the new corporation (c), unless the number of the trustees is expressly limited by the deed of constitution (d). And where the statutes of an hospital devolved certain duties on one of the deacons of the incorporated trades, who were *ex officio* members of the Town Council of Edinburgh, and as such governors of the hospital, it was found that the deacons were no longer entitled to a share in the management, after they had been deprived by the Burgh Reform Act of their seats in the Town Council (e). By 3 & 4 Will. IV., §§ 20 & 23, provision is made for the continuance of trusts vested in municipal corporations under the old constitution. Where any trust is conferred on members of the municipal corporation, under the denomination of “old provost, old bailie, or old dean of guild, or of merchant or trades bailies, or merchant or trades councillors,” the reformed town councils are required to elect trustees. If, on the other hand, the trust is vested in office-bearers of trading corporations, without reference to their municipal character, the right of management is continued to such office-bearers.

(a) *E. of Galloway v. Kirk-Session of Dalry*, 22 Feb. 1810, F. C.

(b) *Cardross*, 1789. See note to case of *E. of Galloway*, *supra*.

(c) *Incorporated Trades of Edinr. v. Gov. of Heriot's Hospital*, 14 S. 879, per Lord Pres. Hope.

(d) *Gov. of Gordon's Hospital v. Min. of Aberdeen*, 8 July 1831, 9 S. 909.

(e) *Trades of Edinr. v. Heriot's Hospital*, 3 June 1836, 14 S. 873.

SECTION IV.

TRUSTEES CANNOT DELEGATE THE OFFICE.

A trustee has no power at common law to devolve the trust upon other parties (a). Care must therefore be taken, in the exercise of powers of assumption, not to deviate from the conditions of the power, else the nomination may be reduced as a devolution. If trustees should unfortunately convey the property to successors in circumstances or under conditions unauthorized by the deed of settlement, the consequences may be serious. Not only will the conveyance be null, as amounting to a devolution of the trust; but every act of the new body is liable to be set aside as irregular and ultraneous. Meanwhile the trust will be held to subsist in the persons of the surviving original trustees, who will therefore be made responsible for any loss which may have been sustained through the maladministration of their successors; and before they can proceed to execute a valid deed of assumption, or to dispose of the property in fulfilment of the purposes of the trust, it will be necessary to clear the title by raising an action of reduction of the illegal deed of conveyance (b).

Consequence
of irregular
Devolution.

(a) *Stair*, I. 12, 6 & 7; *Ersk.* 3, 3, 34; *Freen v. Beveridge*, 28 June 1832, 10 S. 727; *Rennie v. Ritchie*, 25 April 1845, 4 Bell, 221; *Ferrie v. Baird*, and *Davidson v. Mackenzie*, *infra*. In England, the maxim "delegatus non potest delegare" was at one time applied to the actings of trustees in a spirit of blind and ruthless adherence to the literal text. The supposed fascination exerted over the legal mind by the antithetical terminations "-atus, -are," of the phrase, is the subject of a characteristic episode in Bentham's Principles of Legislation. The maxim is still so far in *viride observantia* that a trustee cannot, as in Scotland, depute the active management of the estate to a factor; but he may now transmit money to a co-exe-

cutor, or other confidential person at a distance, for the purpose of distribution, without being held responsible for loss (*Lewin, Tr.*, 4th Ed. 194), or employ a steward in case of necessity, at the risk of the estate. Necessity, said Lord Cottenham in *Clough v. Bond* (3 M. & C. 497, 8 L. J. Ch. 51), would include the regular course of business. Yet in that very case the Lord Chancellor held the representatives of a party liable for the loss of trust money, deposited in bank in the joint names of one trustee, and of the husband of the other, on the ground that the husband had no right to interfere. So strictly is delegation prohibited.

(b) *Freen v. Beveridge*, *supra*.

Examples.

Thus, where a person has acted as trustee without a sufficient title, he will not be allowed to recover from the estate sums which he has advanced to beneficiaries, except in so far as they were made out of the annual proceeds of the property, and in accordance with the directions of the truster (a). Where a power was given to supply places in the trust, vacant by death or non-acceptance—and there were two such vacancies—an assumption of three new trustees was found void as to all the three, the Court having no means of deciding which of the three had been nominated under the trust powers (b). In another case, where, under a general power of assumption, additional trustees were assumed by one of two accepting trustees, without the concurrence of his colleague, who had refused to act, it was held that the assumption was *ultra vires*, and that the trustees so assumed had no title to pursue an action, though they had acted for several years without challenge in the administration of the trust (c). But Lord Mackenzie said that the question was still open, whether homologation of the deed by the recusant trustee might not have validated the appointment, that plea not having been raised on record. The Court will award sequestration of a trust estate pending a dispute as to the title of the trustees to administer (d). Where a power is given of appointing new trustees *in place of* others who may have died or resigned, it would not be advisable to appoint less than the full complement. But such powers ought to be framed in terms which entitle the surviving and accepting trustees to nominate as many additional trustees as they may consider expedient.

Assumed Trustees have not the powers of Executors.

In practice it is understood that a power to assume new trustees does not entitle the assumed trustees to exercise the office of executor. And, accordingly, the Commissary Courts will not grant confirmation in favour of assumed trustees.

(a) *Heriot's Trs. v. Fyffe*, 8 Mar. 1836, 14 S. 670.

(b) *Ferrie v. Baird*, 31 May 1834, 12 S. 672.

(c) *Davidson v. Mackenzie*, 9 July 1835, 13 S. 1082.

(d) *Home v. Hunter*, 7 Mar. 1833, 11 S. 538; see *M'Taggart's Rep. v. Robertson*, 25 Jan. 1834, 12 S. 338; *Flucker v. Noble*, 24 May 1836, 14 S. 817.

CHAPTER XIII.

OF THE VESTING OF THE OFFICE OF TRUSTEE BY ACCEPTANCE, AND OF DISCLAIMER.

THE relation of truster and trustee is completed by acceptance (a). Assuming that the trustee is qualified, he ought, after the trust has become operative, to make up his mind without delay, whether or not he should accept of the office. It can scarcely be necessary to say, that legal advice will be of little or no service in settling a question of this nature. Indeed, the only advice which a lawyer could give to his client, looking strictly to the interests of the latter, would be, never under any circumstances to accept a trust. The duties of trusteeship, accordingly, are usually undertaken from motives in which self-interest has little concern. While the legal adviser may not consider it necessary to dissuade his client from accepting the trusteeship, it will still be his duty to guard against the possibility of allowing any doubt to exist in regard to the *fact* of acceptance, and to take care that the resolution of the trustee, whether to act or to abstain from acting, should be expressed in writing (b). The acceptance or declinature of trustees of testamentary settlements is usually declared at the meeting held after the funeral, which the parties named as trustees are asked to attend, when the settlements are read, and directions given for carrying the trust into execution. If the trust is accepted by a majority of the number entitled to act, the fact will be embodied in the minute of proceedings. It is usual also at this meeting to appoint an agent or factor.

Trustee should either accept or disclaim.

Constitution of Trust by Acceptance.

(a) See Stair, 1, 12, 5.

(b) "Practically it is an advisable precaution," says Bell (Com. I. 31, note 4), "where the majority of the trustees are named as a quorum, that the number of trustees accepting should

be defined by a declaration of non-acceptance on the part of those who decline; or who even in the meantime abstain from acting, reserving in this last case power to resume their place afterwards."

The minute of acceptance ought to be signed by all the accepting trustees; and if any of the trustees have resolved not to accept, the declinature should also be minuted and authenticated by the non-accepting trustees. A minute of acceptance or declinature, or both, is frequently in practice endorsed on the deed constituting the trust, and recorded along with it. The neglect of these precautions has given rise to many difficult questions, both with reference to such acts as amount to constructive acceptance, and also as to the effect of delay in precluding the party from afterwards assuming the office of trustee. These cases we shall proceed to examine.

SECTION I.

OF ACCEPTANCE OF THE TRUST.

Constructive Acceptance.

A trustee may signify his acceptance either by signing a minute or other document to that effect, or by completing a title in his person to the trust estate; by representing himself as a trustee to parties who have dealings with the trust; by executing any power conferred by the truster; or finally by acting as trustee, or permitting his name to be used as a party to the trust. If a trustee knows of his appointment to the office, and allows any considerable time to elapse without disclaiming it, very slight indications of acquiescence in the management will, in the absence of proof to the contrary, create a *presumption* that he has accepted (a).

I. *Express Acceptance of the Offices of Trustee and Executor.*

As to *Locus Pœnitentiæ* after Informal Acceptance.

Written acceptance, although usually expressed by way of *minute*, may also be by letter. Though a signed minute, not holograph, may be good evidence of any ordinary resolution of the trustees, it is more than doubtful whether such a document, not homologated, could be held sufficient to establish acceptance against a trustee resiling *debito tempore*, so as to infer liability for the future acts and deeds of his co-trustees. Where the acceptance is by letter, it has been held that there was *locus pœnitentiæ*; the trustee having

(a) *Wise v. Wise*, 2 Jones & Lat. 1833, 11 S. 292; *Logan v. Meiklejohn*, 26 May 1843, 5 D. 1066. See also *Paul v. Boyd*, 22 Jan.

withdrawn before any steps had been taken in consequence of his provisional acceptance. But a trustee will not be allowed to recede from his acceptance if he have actively interfered in the management, as by corresponding with his co-trustees on the affairs of the trust; or by giving directions for the recovery of debts (*a*); or by attending a meeting of the trustees, and concurring in the appointment of a factor (*b*). And where trustees, who were also nominated tutors and curators, had given instructions to raise a summons for making up inventories of the minor's property, they were not allowed to disclaim the character of tutors-nominate, although no procedure had followed on the summons, and the minute declaring their acceptance of the office was unsigned (*c*). But it would seem that if the trustee's intromissions have been merely of a formal nature, he is entitled to retire from the trust, with leave of the Court of Session, or with the consent of his co-trustees (*d*), although he may not be in a position to disclaim the trust, at his own hand. But such a renunciation, when competent, must be by deed (*e*).

A trustee must be presumed to have accepted, if he make up titles in his person under the trust disposition (*f*). For the law will not permit him to accept the conveyance, except under burden of the trust which is the condition of the grant. The judgment in *Paul v. Boyd*, referred to by Mr Forsyth, as throwing doubt upon this doctrine (*g*), merely asserted that an instrument of sasine is not conclusive and irrefragable evidence of the fact of sasine having been given to the disponee. If he can prove that the notary who executed the instrument in his favour acted without authority, then there is evidence to the Court that the trustee, in point of fact, had not entered into possession, and had not in that way given proof of having undertaken the trust. But we apprehend that trustees could not more effectually signify their acceptance of a trust of

Acceptance by
making up
Titles to the
Estate.

(*a*) *Davidson v. Mackenzie*, 9 July 1835, 13 S. 1082; *Marshall v. Milne*, 1677, 1 Br. Sup. 780.

(*b*) *Logan v. Meiklejohn*, *supra*.

(*c*) *Mollison v. Murray*, 19 Dec. 1833, 12 S. 237.

(*d*) *Logan v. Meiklejohn*, per Lords J.-Cl. Hope and Wood, 5 D. 1072-3.

(*e*) *Davidson v. Mackenzie*, 9 July 1835, 13 S. 1082, per Lord Gillies, 1088.

(*f*) *Cumming v. Hay*, 28 Feb. 1834, 12 S. 508.

(*g*) *Paul v. Boyd*, 22 Jan. 1833, 11 S. 292; Forsyth, Tr., p. 72.

heritable property, than by recording a sasine or notarial instrument in their favour. Then, with respect to moveable property, any person obtaining confirmation as executor becomes a trustee for all concerned (a); and *à fortiori*, an executor-nominate, who confirms as general disponee under a trust deed, must be bound to carry out the purposes of the trust. The same result will follow from his taking out probate; and where probate is taken in terms of the 21 & 22 Vict. cap. 56, it is immaterial, with reference to liability, whether the property to be administered to is wholly in England or partly Scotch; because an executor-nominate is equally bound by the law of England, as of Scotland, to execute the purposes of the trust, if he prove the will (b).

Acceptance of
Trustees for
Execution.

Sometimes no more than a right of action is vested in trustees, as in the case of trustees for execution in marriage contracts. In England, it has been held that parties appointed in this character, with their consent, may sue for specific performance without declaring their acceptance in writing (c). The trustee under a Scotch contract of marriage would put himself *in titulo* by registering the contract, with an acceptance endorsed thereon for execution (d).

Acceptance by
acting as Exe-
cutor.

In England, if an executor be also constituted trustee of the real estate, it is held that his acting as executor is equivalent to acceptance of the entire trusteeship (e).

Whether one
may accept the
Trusteeship
and decline the
Executry.

A much more difficult question arises where trustees are also appointed executors, and some of them are desirous of accepting the trusteeship and declining the executry. This point is of considerable importance in practice, as parties may be quite willing to act as trustees, who will not consent to confirm as executors when the deceased may be largely interested in joint stock companies, involving unlimited liability to the creditors of the company. In such a case it may happen that one of the trustees is also an heir under the settlement, and willing to take the risk of confirming as executor-nominate. If this were done, the title to the shares or other trust property would of course stand in the books of the company in the name of the accepting executor, and there could be no possible pretence for fixing personal liability on the other trustees.

(a) Bell's Com. 656 (5th Ed., II. 81).

(b) Lewin, Tr., 4th Ed. 155.

(c) Cook v. Fryer, 1 Hare, 498.

(d) See *Melville*, 8 Mar. 1856, 18 D. 788.

(e) *Ward v. Butler*, 2 Moll. 533.

Unless it can be shown that the powers of the executor in the case supposed would come into conflict with those of the trustees, we do not see that any objection could be taken to the position of the latter. The case is quite distinct from that of an executor-nominate wishing to decline the trusteeship. Confirmation as executor may amount to constructive acceptance of the trust; but acceptance of the trust cannot bind the trustee to accept the executorship, no person being obliged either to confirm as executor (*a*) or to take probate (*b*) against his will. Nor can it be said that the trustees would be liable to the penalties of vitious intromission, if, instead of actually taking possession of the moveable estate of the deceased, they merely concurred with the executor in giving directions as to its disposal. Indeed their title as trustees would be a sufficient defence to the charge of vitious intromission (*c*). Apart from any apprehension of risk to the trustee (for which we can discover no grounds), there is no technical difficulty in allowing the title to the trust funds to stand in the name of the executor, while the administration is under the control of the entire body of trustees. The office of trustee is personal (*d*), and is constituted by the act of acceptance, although no title may have been made up to the property.

Trustee cannot be compelled to confirm;

not liable as a vitious intromitter.

To illustrate this point, where trustees under a general settlement are directed to hold heritage for a specified time, and thereafter to convey, it has never been doubted that they may permit the heir-at-law to make up a title to the property; and to hold it subject to the purposes of the trust, and thereafter to convey to the beneficiary directly,—the trustees meanwhile drawing the rents and consenting to the ultimate conveyance. The accepting executor in the case supposed is substantially in the same position as an heir-at-law holding property at the pleasure of the trustees; executors being bound by the nature of their office to preserve the testator's funds for the uses which he has appointed, even when not entrusted with the execution of those uses. An executor who has confirmed as such in ignorance of the existence of a trust settlement afterwards discovered, would therefore hold the personal estate for the use of the trustees. It may be said that the executor could require the

Analogous case of Heir-at-law making up title subject to conditions of the Trust.

Case of Executor confirming in ignorance of a Trust.

(a) Bell's Com. 5th Ed. II. 82.

(b) Williams' Exec. 5th Ed. 243.

(c) Bell's Com. 5th Ed. I. 661, II.

85.

(d) Stair, 1, 12, 17.

trustees to take the estate off his hands as soon as he had been made aware of their claim. But suppose both parties agree to allow the funds to stand for a time in the name of the executor, subject to the disposal of the trustees, it does not appear that an arrangement of this nature ought to alter the legal relations or liabilities of the parties. Of course, if the trustees were afterwards to require the executor to apply the funds to a purpose which he conceived to be unauthorized by the settlement, he would be at liberty to decline paying without the protection of a decree.

Opinions of
Lord St
Leonards and
Mr Justice
Williams.

The point in question has never been expressly raised either in the English or Scotch Courts, but the authorities, so far as they go, support the opinion which we have attempted to illustrate. Lord St Leonards, on the authority of an early case, says that executors who have renounced probate *may execute a power* under the will (a). Mr Justice Williams considers that this doctrine is of doubtful authority, except in the case where the power is given them in their proper names, and without reference to their office as executors. The learned author does not advert to the case which is most likely to arise in practice,—namely, where the power is given to them as trustees (b). But if a trustee who has not confirmed may execute all the *powers* of the settlement, it is reasonable to conclude that he may also give directions to the accepting executor regarding the distribution of the funds. Indeed the settlement itself would be binding on the executor as regards the destination of the property; the question of the trustee's right to execute powers being in reality the only difficulty which the case in question presents.

In Scotland
Trustees may
decline Tutorship
or Curatorship.
A party appointed
Tutor and Curator
not bound to
accept both
offices.

In the law of Scotland we have no direct authority on the point; but the law of guardianship presents an argument from analogy (c). Not only is a trustee entitled to decline the guardianship, but where the same party is appointed tutor and curator, he may accept the office of tutor and decline that of curator, the matter being regulated by the statute 1696, c. 8. In an old case, where a testator appointed several executors, and constituted one of them "universal intromitter," the title of the latter to sue without the concurrence of his colleagues was sustained, "by reason that he was constituted only

(a) 1 Sug. Pow. 139, 7th Ed.

(b) Wil. Exec. 251, 5th Ed.

(c) *Mollison v. Murray*, 19 Dec. 1833, 12 S. 237, noted *infra*.

intromitter; and towards the rest of the executors in this case, that their office was frustrate, and of no avail" (a).

If the same parties are nominated trustees for two distinct trusts, and the two conveyances are embodied in one settlement, it would seem that in England, if they accept the one, they will be held to have accepted both (b). This conclusion may be deduced from a consideration of the great inconvenience of allowing a separation of trusts in such cases; there being in almost all settlements some special and limited trust distinguishable from the general inheritance. But the point has never been decided in Scotland (c).

Where two
Trusts con-
tained in one
Will.

Trustees, who are at the same time nominated tutors or curators, are entitled to decline the guardianship; for there is no necessary identity between the relation of guardian and that of trustee. But their intention to disclaim the offices of tutor and curator should be distinctly stated in the minute accepting the trust, or in a separate minute executed *debito tempore*; else the presumption would be for a general acceptance (d). That presumption, however, could scarcely be supposed to hold, if the children had other guardians, or a father, entitled to act for their interest (e).

Trustees not
bound to act
as Guardians.

II. Constructive Acceptance of the Office of Trustee.

It has never been held that acceptance of a trust is to be presumed in consequence of the trustee having taken possession of the property or effects *via facti*, until a legal custodier can be found. But possession of such a nature as would in the ordinary case infer a passive title, will, when the possessor is a trust disponee, go far to prove that there was an intention to accept; the question of acceptance being merely an issue of fact, the proof of which is not restricted by any special rules of evidence.

Custody of
Moveable
Effects.

It may be asked, whether taking possession on a lease, in virtue of the general conveyance in a trust settlement, is not an acceptance

Taking pos-
session on a
Lease.

(a) *Hamilton*, 1565, M. 14686.

(b) *Urch v. Walker*, 3 M. & C. 702.

(c) As to the application of the doctrine of approbate and reprobate, see *Black v. Watson*, 9 Feb. 1841, 3 D. 522.

(d) *Mollison v. Murray*, 19 Dec. 1833, 12 S. 237.

(e) Although there are two old de-

cisions, holding that tutors nominated by a stranger are bound to make up inventories as such (*Kilpatrick v. Macalpine*, 1793, M. 16381; *Hamilton v. Hawkins*, there cited), the better opinion seems to be, that such tutors are mere trustees (2 Fraser, 77; Bell's Ill. III. 28; More's Notes, 35, 36).

of the grant? If the trustee has intimated the assignment in his favour, or has recorded a notarial instrument where the lease is registered under the Act of 1857, it would seem that there is legal possession in virtue of the trust conveyance. If there has been neither intimation nor registration, the intention of the trustee, as regards acceptance, must be looked to.

Acceptance by
joining in
acts of Trust
Administration.

Amongst the acts of administration inferring constructive acceptance and liability as trustees, are the concurring in the appointment of a factor (a), and the giving directions to recover debts (b). So also, if the trustee sist himself as a party to an action in place of the settlor, or allow his name to be used in legal proceedings without entering a disclaimer on record (c), or concur in signing a discharge (d), or a receipt for money (e), or authorize the uplifting of funds (f), or give directions to his co-trustee to realize the trust property (g), he will be deemed to have acted under the trust, and will incur liability accordingly.

Acts which
do not infer
Acceptance.

In the case of *Blain v. Paterson* (h), one of three trust disponees declined, in the first instance, to accept; but after the death of one of the acting trustees, he accepted the trusteeship to the extent of joining in a deed of assumption, which assumption was made in virtue of the provisions of the trust deed, and on the narrative, that doubts had been entertained as to the power of a sole trustee to execute a valid assumption in terms of the deed. The Court held, that there was no ground for subjecting the non-acting trustee in liability. In this case the learned judges seem to have given more than the ordinary weight to the declaration of immunity in the settlement. Again, if the interference of the trustee is clearly referable to other causes, not importing acceptance, as in *Mitchell v. Davidson* (i), where the pursuer had acted as clerk to the trust, but had disclaimed the character of trustee, liability will not be presumed. And it is not to be inferred that a donee has accepted

(a) *Logan v. Meiklejohn*, 26 May 1843, 5 D. 1066.

(b) *Davidson v. Mackenzie*, 9 July 1835, 18 S. 1082.

(c) *Gavin v. Kirkpatrick*, 30 May 1826, 4 S. 629; *Logan v. Meiklejohn*, *supra*.

(d) *Watson v. Crawcour*, 9 June 1843, 5 D. 1182.

(e) *Blain v. Paterson*, *infra*.

(f) *M'Millan v. Armstrong*, 6 Dec.

1848, 11 D. 191.

(g) *Seton v. Dawson*, 18 Dec. 1841, 4 D. 310.

(h) *Blain v. Paterson*, 28 Jan. 1836, 14 S. 361.

(i) *Mitchell v. Davidson*, 20 Dec. 1855, 18 D. 284.

the trust by reason of his having sent the trust deed to the record for preservation. A trustee is certainly entitled to the interim custody of any testamentary conveyance in his favour; as it may be considered to have been constructively delivered to him. And though he cannot retain the deed after having resolved to disclaim the trusteeship, he is of necessity entitled to a reasonable time for deliberation, and for obtaining the advice of counsel as to whether he ought to accept; and, in the meantime, there can be no impropriety in recording the settlement for preservation.

It will be apparent, from the tenor of the decisions in relation to constructive acceptance, that a trustee has nothing to gain by omitting to declare his acceptance. On the contrary, the Court is always disposed to favour an honest trustee, who accepts the responsibilities of his office unreservedly, if he has come forward for the protection of the estate; while any attempt at interference by a trustee, under colour of giving advice or of intromitting in another capacity, is almost certain to involve the individual in the liabilities which he is anxious to avoid. A trustee, with whom other parties are associated in the trust, places himself at a double disadvantage by neglecting to declare his acceptance in a regular manner; being liable, on the one hand, to be excluded by his co-trustees from a voice in their deliberations; and, on the other, to be called to account for acts of mismanagement, to which he may be presumed to have assented, notwithstanding his enforced abstention from any active participation in the mischief.

Acceptance
ought not to
be left to inference.

Trustees who intromit with moveable property of a defunct, without confirming as executors, or recording probate within a year and day, are in danger of subjecting themselves to the penalties of vitious intromission, and thus incurring universal liability for the truster's debts,—not, however, on the ground of fraud, but simply in consequence of “possession being taken contrary to the due order of law” (a). And trustees who assume the character of tutors and curators without having the inventories of the minor's estate judicially authenticated, are bound, notwithstanding the existence of a protecting clause, to account under the liabilities of the Act 1672, c. 2 (b).

Vitious intromission.

(a) *Forbes v. Forbes*, 12 June 1833,
2 S. 395.

(b) *Mollison v. Murray*, 19 Dec.
1833, 12 S. 237.

Executor-dative or Heir making up a Title cannot execute the Trust.

If executors-nominate, under a settlement, choose to disclaim the trust, and allow another party to confirm as executor, the *executor-dative* is said to become a trustee for all concerned in the succession (a). By this expression we are not, however, to understand that the executor has thereby assumed the character of a trustee for the execution of the purposes of the settlement. He holds the position of a trustee, as explained by Mr Lewin, in no other sense than as taking the surplus assets after the ordinary administration, with notice of a trust (b). Any duty devolving upon him in relation to the succession will therefore be discharged by raising a multiplepointing, and consigning the balance in process (c). If there are trust purposes remaining to be carried out, the beneficiaries may apply for the appointment of a judicial factor, who will take the fund for distribution. Again, if trustees have neglected to record the conveyance of lands in their favour, or an instrument of possession following upon it, and the heir-at-law makes up a title by service, such heir is merely a trustee for the purpose of disposing to the trustees under the settlement, and will not incur liability, as representing the truster (d).

Trustee infeft by mistake ought to grant a reconveyance.

If a person becomes a trustee by mistake, as by being infeft without his consent, it has been held that he is bound to grant a conveyance to the party in right of the fee; but he will not thereby incur liability as an accepting trustee (e). Nor will an heir-at-law, who has entered by service, not knowing that his rights are excluded by deed, be held to have incurred a passive title, though he will be bound to account for his intromissions (f), and to grant a conveyance of the estate to his ancestor's disponees (g). Where an estate was conveyed to a purchaser by assigning an unexecuted precept, and the friends of the purchaser, with the view of protecting the estate against the risk of forfeiture, caused the vendor to be infeft without the knowledge of either of the parties, it was found that

(a) Bell's Com. 633 (5th Ed. II. 82); *Kirkpatrick v. Innes*, 17 Mar. 1830, 4 W. & S. 55, per Lord Wynford.

(b) Lewin, Tr., 4th Ed. 157.

(c) See *Forbes v. Campbell*, 17 July 1845, 7 D. 1068.

(d) *Aytoun's Crs. v. Aytoun*, 1784, M. 9732.

(e) *Dallas v. Leishman*, 1710, M. 16191. See Bell, Com., 5th Ed. I. 31; Pr. § 1993, 3.

(f) *Mercer v. Scotland*, 1745, M. 9786.

(g) *Fraser v. Frasers*, Hume, 885.

the rights of third parties were not prejudiced by the arrangement ; and the vendor having, as trustee for all concerned, granted a conveyance in implement of an assignation by the purchaser to the precept (supposed to be still open)—an infeftment upon the trustee's conveyance was sustained as constituting a preference, although the first purchaser had been made bankrupt in the interval between the date of his ineffectual assignation and the infeftment (a).

When a trustee has accepted the office, he must bear in mind, as Mr Lewin observes (b), that he is not to sleep upon it, but is required to take an active part in the execution of the trust. The distinction, if there be any, between acting and non-acting trustees is a very slender one ; and trustees who rely too confidently upon the customary exemption from liability for omissions, rarely find in it an adequate protection against the consequences of a neglect of duty. When a non-acting trustee authorizes certain acts to be done through the intervention of the acting trustee, he is responsible for the due execution of his mandate, as much as if he had been the agent himself ; as, for example, if he give authority to his co-trustee to realize the trust property, or deliver a receipt as a warrant to uplift funds, and the proceeds are afterwards misapplied (c). When a trustee has been assumed into the management of a subsisting trust, he ought at once to inquire into the position and circumstances of the property, and have the accounts audited and settled as at the date of his assumption. Where accounts were not so settled, the assumed trustees were found, in an action raised by the representatives of one of the beneficiaries, to be liable to give an account of the intromissions of their predecessors, in so far as not audited, as well as of their own intromissions with that part of the estate conveyed to them ; and the Court reserved the question as to the liability of the assumed trustees for any deficiency arising out of the intromissions in question (d).

Every Trustee
is in law an
Acting Trustee.

Duty of as-
sumed Trus-
tees.

(a) *Beaton v. Mackenzie*, 1737, M. 1150. 14 S. 361 ; *Seton v. Dawson*, 18 Dec. 1841, 4 D. 310.

(b) *Lewin, Tr.*, 4th Ed. 159.

(d) *Somerville's Trs. v. Wemess*, 8

(c) *Blain v. Paterson*, 28 Jan. 1836, Dec. 1854, 17 D. 151.

SECTION II.

OF DISCLAIMER.

Trustee not
bound to
accept.

"A trust," says Bell, "cannot be constituted in the person of another without his consent, to the effect of obliging him to do any act, however innoxious to himself, or easy to be done" (a). And although it is not unusual before executing a settlement, especially if it be a marriage contract, for the settlor to obtain the consent of his friends to their nomination as trustees, yet an acceptance signified in this way before the trust has come into actual operation, has not been considered to import a legal obligation to undertake the office. There is always *locus pœnitentiæ* until the time when it becomes necessary to carry the trust into effect. If the law were otherwise, inexperienced persons might easily be entrapped into accepting a position of responsibility, the nature of which could not be accurately known whilst the property remained in the custody of the truster. The principle has been thus explained by Lord Redesdale in the English case of *Doyle v. Blake*: "Though a person may have agreed in the lifetime of a testator to accept the executorship, he is still at liberty to recede, except in so far as his feelings may forbid it; and it will be proper for him to do so, if he finds that his charge as executor is different from what he conceived it to be when he entered into the engagement" (b); and, as regards moveable settlements at least, this is now understood to be the law of the United Kingdom. It must be remembered, however, that the duty of a marriage contract trustee as protector of the contract, begins as soon as the marriage is contracted, although he may have no actual business to perform during the life of the spouses. Supposing that such a trustee endorses an acceptance of the trust on the contract at the time of its execution, he could scarcely maintain that he was entitled to withdraw when afterwards called upon to act.

Whether non-
accepting
Trustee en-
titled to exe-
cute Power of
Assumption.

It is doubtful whether a trustee who means to disclaim is entitled to accept in the first instance, with the view of concurring

(a) Bell's Com., 5th Ed. I. 31; Pr. § 1993, 3.

(b) *Doyle v. Blake*, 2 Sch. & Lef. 239.

in the assumption of new trustees. It was held at one time by the Court of Session, that it was the duty of a trust assignee in whose favour sasine had been taken without his knowledge, to reconvey on receiving payment of all expenses and being discharged of all war-randice (a). But this must be considered as questionable law; because the disponent—who had never accepted the trust—was actually not in a position to take infeftment; and the sasine having been given without a mandate, was a nullity. In such a case we see no good reason for compelling the disponent to grant a deed in a character which he had never assumed, and which did not lawfully belong to him. A reduction of the instrument would seem to be the more appropriate remedy (b). But a trustee infeft by mistake could not, we think, be deemed to have incurred responsibility, by merely denuding in favour of the owner. This case, however, is somewhat different from that of an assumption of new trustees by a party under no obligation to act. The later authorities are favourable to the exercise of such a power by non-accepting trustees; and after the decision in *Blain v. Paterson*, which we shall refer to immediately, and Lord Brougham's dictum in *Miller v. Black's Trs.*, it would be impossible to object to a trustee disclaiming *in limine*, on the ground that he had concurred in a deed of assumption (c).

The general rule undoubtedly is, that a trustee who has introduced with the trust estate, or done any act implying acceptance, is understood to have waived his privilege of disclaiming the office, and cannot (unless empowered to resign) withdraw from its responsibilities, however onerous and unforeseen these may prove to be (d). But the rule is an equitable one, and will not be enforced oppressively. And therefore when a trustee, who had intimated that he would accept, but had differed *in limine* with his co-trustees as to the management of the trust, afterwards declined to act, his declination was sustained as competent and timeous (e). And in a case

A Trustee who has introduced cannot disclaim responsibility;

may withdraw while *res sunt integra*.

(a) *Dallas v. Leechman*, M. 16191; 2 Ill. 545; see Com., 5th Ed. I. 31.

(b) See *Paul v. Boyd*, 22 Jan. 1833, 11 S. 292.

(c) *Blain v. Paterson*, 28 Jan. 1836, 14 S. 361. See *Miller v. Black's Trs.*, 14 July 1837, 2 S. & M'L. 889, per Lord Brougham.

(d) Bell's Pr. § 1993, 4; Lord *Lynedoch v. Ouchterlony*, 15 Feb. 1827, 5 S. 358, affd. 7 July 1830, 4 W. & S. 148; *Cumming v. Hay*, 28 Feb. 1834, 12 S. 508; *Logan v. Meiklejohn's Trs.*, 26 May 1843, 5 D. 1066.

(e) *Lady Bannerman v. Bannerman*, 1 Dec. 1842, 5 D. 229.

already referred to, where one of several trust disponees declined to accept, but afterwards concurred in the assumption of a new trustee in place of one deceased, and the deed contained the usual clause of immunity, it was held unanimously that the joining in this formal act of administration, for the purpose of enabling the trust to be carried on, did not infer liability for intromissions either prior or subsequent to the deed of assumption (*a*). And a trustee who had merely concurred in executing a discharge—his concurrence being necessary to make up a quorum—and had afterwards gone abroad, was held not to have undertaken a general responsibility as trustee (*b*). In England the weight of authority tends to support the view, that the mere fact of subscribing a conveyance to the legal estate in favour of the parties on whom it would legally devolve, does not import acceptance of the trusteeship (*c*); Lord Eldon having held, that where the intention was to disclaim the trust, the instrument ought to receive that construction, though it was a conveyance in form (*d*).

Trustee who does not expressly decline may afterwards join in the Administration.

The simplest mode of declining a trust is to abstain from accepting, and from all acts importing acceptance. It has been observed, however, that a trustee who merely abstains from acting may afterwards assume the office (*e*); while one who expressly disclaims the office is held to have forfeited his position as an original trustee (*f*). But it is not very easy to determine what modes of declinature shall preclude a trust disponent from afterwards taking part in the administration. In *Blain's* case there was a written refusal to accept, yet the same person afterwards joined in a deed of assumption, and no objection was taken to the competency of this proceeding. Yet if the refusal to accept has been made matter of solemnity, it ought to be treated as final; there being no authority for holding that a deliberately executed renunciation of a trust is revocable by the trust disponent. When the trust disposition conveys the estate to certain parties, and to the acceptors, as trustees, and some of their number execute a minute of disclaimer, while a quorum of the

Secus where the Destination is to the Acceptors.

(*a*) *Blain v. Paterson*, 28 Jan. 1836, 14 S. 361.

(*b*) *Watson v. Crawcour*, 17 Feb. 1844, 6 D. 688.

(*c*) *Lewin, Tr.*, 4th Ed. 151.

(*d*) *Nicolson v. Wordsworth*, 2 Sw. 372.

(*e*) *Darling v. Watson*, 11 May 1825, 1 W. & S. 188; *Blain v. Paterson*, *supra*.

(*f*) *Forsyth, Tr.* 71.

trustees agree to accept, it is evident that the non-accepting trustees become disqualified, under the terms of the conveyance, from afterwards coming in as original trustees. For the condition as to acceptance is purified as soon as each trustee has declared his resolution; and the conveyance will immediately take effect in favour of the accepting trustees, to the exclusion of non-acceptors.

The case is equally clear where the name of a trust donee has been omitted, with his sanction, in any deed or proceeding necessary for vesting the estate. And, accordingly, Prof. Bell has affirmed (a) that the refusal by a trustee to allow his name to be included in infestments, would be equivalent to a refusal to accept; and he adds, that the infestments so completed would be *prima facie* evidence of non-acceptance. When, on the other hand, a trustee is aware that his name is being used by his co-trustees in taking infestment, or as a party to legal proceedings, and he takes no means to interpell them, the question whether he has not accepted resolves into an issue of fact. Thus, in the case of *Logan v. Meiklejohn* (b), a trustee who had renounced the office after informing himself of the state of the trust affairs, was held not entitled to relief from liability for law expenses, inasmuch as he had neglected to record a disclaimer,—the Lord Justice-Clerk Hope observing: “I think it necessary that the pursuer should show either the concurrence of the trustees to his resignation, or that he had subsequently interpellated them from using his name. His dissatisfaction with the manner in which the trust was conducted makes against him; for it made the necessity the greater for him to come forward, and interpellate them from the use of his name; but although for years his name is used, he enters no proper disclaimer” (c).

Trustee allowing his name to be used without protest cannot disclaim.

In *Paul v. Boyd*, an attempt was made to challenge a sasine that had been executed twenty-five years previously, on the allegation that one of the trustees had never accepted. Lord Corehouse, Ordinary, observed, that possession of a disposition by the attorney of a donee “creates a *presumptio juris* that the donee accepts of the disposition, and authorizes sasine to be given to him in terms of it, and under its conditions. This presumption may be redargued

Constructive Acceptance is a question of fact.

(a) Bell's Com. 845 (5th Ed. I. 32).

(b) *Logan v. Meiklejohn*, 26 May 1843, 5 D. 1066.

(c) 5 D. 1073.

Weight to be
allowed to
Presumptions.

by evidence; but no such attempt is made here." And accordingly the interlocutor, to which the Court adhered, sustained the sasine as valid and effectual, in the absence of any attempt to prove, extrinsic of the deed, either that the trust had, or had not been accepted (a). On the other hand, in the recent case of *Mitchell v. Davidson*, a trust disponee who had attended a meeting of trustees, and had written out a minute of the proceedings, in which he stated that he "declined giving any opinion or vote, or incurring any responsibility," was assoltized from an action of accounting directed against himself, in conjunction with the other trustees. The Lord Justice-Clerk, advertng to a Chancery case (b), observed, that such cases were not to be determined upon legal presumptions; they were matters of evidence in which the facts were of the greatest moment (c). In the English case of *Wise v. Wise* (d), it was ruled that the presumption in such cases was for acceptance; Lord St Leonards observing, "that where an estate was vested in trustees who knew of their appointment, and did not object at the time, they would not be allowed afterwards to say they did not assent to the conveyance, and it would require some strong act to induce the Court to hold that in such a case the estate was divested. He spoke with respect to the effect upon third parties; every Court and every jury would presume an assent."

Judicial Dis-
claimer.

A trust may be judicially renounced, upon cause shown, by an accepting trustee against whom action is raised to enforce his concurrence in the administration (e). And *à fortiori*, if a trustee has not accepted, he is entitled to put in a defence of disclaimer when sued for implement of the trust (f); or he may apply to the Court for authority to withdraw, if the fact of his non-acceptance is disputed (g). If all the trustees disclaim, in an action of reduction of the trust deed, the Court will not proceed until the beneficiaries have been sisted or called for their interest (h). If an original

(a) *Paul v. Boyd*, 22 Jan. 1833, 11 S. 292.

(b) *Conyngham*, 1 Vesey, 522.

(c) *Mitchell v. Davidson*, 20 Dec. 1855, 18 D. 284.

(d) *Wise v. Wise*, 2 Jones & Lat. 403.

(e) *Dick's Trs. v. Pridie*, 9 June

1855, 17 D. 835. Declinature sustained in respect of ill health.

(f) *Davidson v. Mackenzie*, 9 July

1835, 13 S. 1082.

(g) *Bannerman v. Bannerman*, 1 Dec. 1842, 5 D. 229, p. Lord Cuninghame, 235; *Logan v. Meiklejohn*, *supra*.

(h) *Megget v. Thomson*, 8 Dec. 1827, 6 S. 224.

trustee have once accepted, it appears, according to English practice, that *his heir* is not entitled to disclaim (a); this rule having been introduced, it is said, to prevent the legal estate from falling to the Crown as *ultima hæres*. The exception in question, however, has no foundation in the law of Scotland. If the heir declines to make up a title and denude in favour of the beneficiary, a direct title may be made up by a declaratory adjudication, which is always directed against the heirs of the last surviving trustee, or, if there be no destination to survivors, then against the heirs of the whole body, and also of the truster (b). An adjudication raised during the life of original non-accepting trustees is, on the contrary, directed *contra hereditatem jacentem*, and the trustees are merely called for their interest.

How Beneficiary's Title may be completed.

With respect to the effect of renunciation by a trustee, it is to be observed that any act of the nature of renunciation or disclaimer which is sufficient to free the trustee from responsibility, will also suffice to vacate his personal right to the estate. The right conferred on any individual trustee is so far conditional, that it does not vest until the period of acceptance. Failing such acceptance, it lapses altogether; so that the entire fee of the trust estate comes to vest in the persons of the accepting trustees. If infestment has been taken or confirmation expedite in the names of the accepting trustees, there can be no doubt that the title of those who have not accepted is completely extinguished.

Disclaimer cuts off the legal Estate.

The effect of disclaimer upon the title will depend on the terms of the trust destination. If there are other trustees entitled to accept and to act by themselves, they may proceed at once to make up titles, by means of which the trust estate may be vested in their persons to the exclusion of the non-accepting trustees. In the preceding chapter we have had occasion to consider what terms are sufficient to vest the estate in a limited number of accepting and surviving trustees. We refer to another chapter (c) for a fuller investigation of the manner of completing the title to a succession under a lapsed trust; premising that our observations upon the effect of a lapse by death or resignation are equally applicable to

Effect of Disclaimer upon Title to the legal Estate.

(a) Lewin, Tr., 4th Ed. p. 150.

(b) Findlay, 30 June 1855, 17 D. 1014.

(c) Chapter XV., on the Vesting of the Legal Estate in the Trustee. And see Part III.

the case of trusts which are in abeyance in consequence of the declinature of the trustees.

Non-accepting
Trustee may
accept remun-
erative em-
ployment.

A trustee who has *debito tempore* declined the appointment may afterwards be employed as a factor, commissioner, or agent, though it is doubtful whether he can claim remuneration for his services. The Court will not appoint a trustee who has declined to accept, to be judicial factor on the trust estate (a). The case of *Mitchell* (b) suggests a warning to professional men nominated as trustees, to abstain from all interference with the administration of the trust, if they intend to renounce; since anything approaching to an act of administration may be seized hold of at some future time for the purpose of rearing up a case of constructive acceptance, which, if established to the satisfaction of the Court, would not only disentitle the trustee to professional remuneration, but might even subject him to responsibility for the acts of his co-trustees.

Can non-ac-
cepting Trus-
tee take a
Legacy?
Opinion of
Lewin and
Roper.

The question has been much discussed, whether a non-accepting trustee can claim a legacy in his own favour. Mr Lewin is of opinion, but with hesitation, that he may (c). A somewhat different opinion is expressed by Mr Roper, who says (d),—"Bequests to individuals who are executors are considered *prima facie* to be given to them in that character; a presumption to be repelled by the nature of the legacies or other circumstances arising in the will." It is not easy to discover any definite principle in the cases bearing on this point; though the tendency of the later decisions, both Scotch and English, is towards the view expressed by Mr Lewin. In *Reid v. Devaynes* (e), legacies given to persons by the description of "my very good friends," who in another part of the will were desired "to act as executors," were found not due in consequence of the legatees having declined to act. In *Stackpoole v. Howell* (f), a testator disposed his estate upon trust to three individuals, and appointed them executors. He made two codicils, in which he gave these three persons legacies, not expressly as trustees and executors, but by their names and descriptions. The legacies in both cases were classed together, and of equal amount. The legatees

(a) Pet. *Pennycook*, 20 Dec. 1851,
14 D. 311; Pet. *M'Culloch*, 11 Dec.
1851, 14 D. 311.

(b) *Mitchell v. Davidson*, 20 Dec.
1855, 18 D. 284.

(c) Lewin, Tr., 4th Ed. 151.

(d) Roper, Leg. 780.

(e) 3 Bro. Ch. C. 95.

(f) 18 Vesey, 417.

renounced probate. Sir W. Grant said, the question was, whether it was not necessary to find circumstances to show that the legacy was intended for the executor in a distinct character; otherwise there was a *prima facie* presumption that it was intended to be given him as executor,—and that there was something in the circumstance of the legacies being classified together and of equal amount. It seemed to him, therefore, that the testator had considered the legatees in the character of executors.

We shall refer now to the cases in which the Court has given the legacies to non-accepting executors. In *Dix v. Reid* (a), a testator bequeathed to two individuals L.50 each, upon condition of their acting as executors. In a subsequent part of the will he bequeathed “unto my cousin, Thomas King, the sum of L.50, whom I appoint as joint executor in trust in this my will.” King declined to act. The Master of the Rolls found that the legacy was due. Exception having been taken to his judgment, Sir John Leach overruled the exception, and considered that the gift was intended to be bestowed rather in respect of relationship than of his office. He, however, considered the case very doubtful. In *Cockerell v. Barber* (b), a testator, after giving a legacy to Mr Palmer, “his friend and partner,” appointed him one of his executors, and made other devises and bequests in his favour, so that he was entitled to much greater benefit under the will than any of the other executors. By a codicil, in which Mr Palmer was described as one of the executors, a further legacy was bequeathed to him. Sir John Leach, V.-C., held that the legacy was not given to him in the character of executor, and that he would be entitled to it whether he accepted or not. This decision was confirmed by Lord Eldon. A similar decision was given in a very recent case, under an application to the Lords Justices in Chancery for their opinion and direction (c). The bequest was in these terms: “I give to my friend, J. T., banker’s clerk, and one of the executors of this my will, L.50.” J. T. having renounced probate, it was argued for the representatives of the executry estate, on the authority of the cases of *Stackpoole v. Howell* and *Reid v. Devaynes*, already mentioned, that the money was given to the legatee in his character as executor, and upon the

Held that
Legacy might
be taken by
non-accepting
Executor.

Opinion of
Knight Bruce
& Turner, L. J.

(a) 1 Sim & Stu. 237.

(b) 2 Russ. Ch. C. 585.

(c) *In re Dendy*, 31 L. J. Ch. 184.

implied condition that he would discharge the duties of the office. But their Lordships were of opinion that the legacy was not conditional, and made an order declaring him entitled to payment.

Doctrine extended to the case of Discretionary Trusts.

The above are cases relating to executry alone. But in *Andrew v. Trinity Hall* (a), the principle was extended to trusts of a discretionary nature. The testator had devised to the corporation of Trinity Hall, Cambridge, certain valuable property, coupled with the condition of founding certain fellowships; and by the same will he gave L.100 and some plate to the College. The corporation declined to be a party to the institution of the fellowships on the terms proposed, and consequently did not accept of the trust of the real property. However Sir William Grant decided that they were entitled to the legacy of personalty, holding that the principle of election did not apply, since no legatee was disappointed by their refusal of the endowment; and that it was fair to presume that the testator's respect for the fellows, and his hope that they would comply with his wishes, had induced him to make them a present of L.100 and the plate.

Authorities in the Law of Scotland.

Prof. More, in stating the import of the Scotch authorities (b), says, that where it appears that the testator meant to give the legacy without regard to the acceptance of the office, it will not lapse. In two old cases (c), it was found that legacies left to relatives appointed tutors in a settlement were not due when they did not accept the office, though it did not appear that their acceptance was made a condition of the bequest. A different judgment was obtained where a testator made the following provision in his settlement: "My said trustees are hereby requested, each of them, to accept of the sum of L.500 stg. as a mark of my friendship, and the further sum of L.105 each to purchase a hogshead of claret, as a recompense for their trouble in the management of my affairs, and as a further testimony of my affection for them." One of the trustees did not accept, and admitted that he had no right to the legacy of L.105. But the Lord Ordinary (Meadowbank) found him entitled to the L.500, and the Court, by a majority, adhered. The majority con-

(a) *Andrew v. Trinity Hall*, 9 Ves. 525. See Vice-Chancellor Wood's remarks on this case in *Warren v. Rudall*, 1 Johns. & Hem. 1, 29 L. J. Ch. 543, 545.

(b) 1 Notes on Stair, 36.

(c) *Scrimzeour v. Wedderburn*, 2 Feb. 1675, M. 6357; *Leckie v. Renny*, 7 Dec. 1748, M. 6347.

sisted of Lord President Hope, and Lords Craigie and Balgray. The two latter thought that, unless it could be shown that the performance of the duty of a trustee was a condition of the bequest, the legacy would be due whether they accepted or not. Lords Hermand and Gillies were of a different opinion, and thought both legacies were left to the trustees in their character as such (a). In the case of *Davidson v. Mackenzie* (b), a doubt was expressed by Lord Gillies as to the competency of disclaiming a trust after the trustee had accepted a legacy; but we are left in ignorance of the terms of the trust deed under which the election fell to be made.

The solution of this question, in relation to the law of Scotland, appears to depend upon the extent to which the doctrine of Approbate and Reprobate is applicable to the appointment of trustees. If applicable, it rests on the assumption that the legacy in question is given upon condition that the legatee accepts the disposition of the testator's property, and such conditions are not to be established by mere inference or conjecture, but only upon the clearest implication (c). Now, the grant of a legacy to a trustee does not seem necessarily to *imply* that the legacy is given conditionally on his accepting the trust, unless there are words denoting that it is given in acknowledgment of his services. Trusteeship being at common law a gratuitous office, the presumption rather is, that the legacy was *not* given in consideration of services in that capacity; and as the trust does not lapse by the failure of the trustees, there is the less reason for maintaining that the intentions of the testator would be defeated by reason of such failure. On the contrary, there may be very good reasons why a beneficiary should renounce the trusteeship; since, in the event of a conflict of interest between himself and the other beneficiaries, he could hardly be expected to hold an even balance. To these considerations we may add, that next of kin—who are executors at common law—are not obliged to confirm as a necessary condition of obtaining the property.

Whether doctrine of Approbate and Reprobate is applicable.

(a) *Stewart v. Henderson*, 13 Dec. 1825, 4 S. 306.

(b) 13 S. 1084, *note*.

(c) Bell's Com. 67 (5th Ed. I. 150).

CHAPTER XIV.

OF THE DEVOLUTION OF THE OFFICE OF TRUSTEE TO SUCCESSORS.

SECTION I.

ASSUMPTION AND ELECTION OF NEW TRUSTEES.

Assumption
under the Pro-
visions of
Trustee Act,
1861.

Constitution
of powers of
Assumption.

By the provisions of the Trustee Act (a) there is now imported into every trust deed, in which gratuitous trustees are nominated, a power to the trustee (if there be only one), or to the trustees or a quorum of them, to assume new trustees. The same power has been very generally conferred by trusters in private settlements; and where a power is given in special terms, the special power will supersede that of the statutory enactment, which is only to be operative where the contrary is not expressed. Care should therefore be taken, where a power of assumption is given *per expressum*, that the special power should be at least as broad as that which is conferred by the statute. Powers of assumption are usually given by a special clause, but they may be conferred by words of destination in the dispositive clause, as in a destination to such persons "as may be assumed by my said trustees to act along with them" (b). Powers of assumption are discretionary, and therefore the acts of the original trustees cannot be called in question merely on account of their having delayed to fill up vacancies in their number. It does not appear to be very material whether the power is expressed in words directory or imperative. But the truster can effectually

(a) 24 & 25 Vict. cap. 84. The question whether the Act is retrospective, is noticed, *infra*, p. 282. See

English Act, 23 & 24 Vict. cap. 145, § 27, as restricted by § 84.

(b) *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 914.

enforce observance of a direction to assume, by providing that no act of the trustees, *other than that of assumption*, shall be lawful, unless assented to by a specified number of trustees. This form of clause is recommended as preferable to a simple proviso, that a specified number of trustees shall be requisite to form a quorum; for, supposing their number to be reduced by death or non-acceptance to less than a quorum, the effect of such a proviso would seem to be, that no deed of assumption could be executed for want of a quorum to sign it, though there is undoubtedly some authority of a contrary tendency (a).

Thus, in the case of *Blain v. Paterson* (b), the Court refused to find a trustee liable for intrusions who had merely accepted to the effect of concurring in a deed of assumption, his acceptance being necessary to make a quorum; and again, in *Miller v. Black's Trs.*, Lord Brougham observed that, "though the trustees are only empowered to assume on vacancies, that is quite sufficient for continuing the trust, and would make it their duty to continue it, even if they altogether decline themselves" (c). Such a devolution of the trust may perhaps be regarded as analogous to the conveyance of an estate by the heir-at-law to his ancestor's donee; since it is a duty which, according to Lord Brougham, he cannot refuse, and for the exercise of which he cannot of course be made responsible. The provisions of the Trustee Act, 1861, enabling trustees to resign, furnish the means of avoiding liability for concurring in acts of assumption, or other formal proceedings.

Can a non-accepting Trustee exercise a power of Assumption?

While the failure to obtain a quorum of accepting trustees would raise no obstacle to the assumption of others in their room, the failure of a quorum by death might create a greater diffi-

(a) If the power is directory, the survivors seem to be entitled to appoint, although numerically below the standard of efficiency, as has been found in several English charity cases. Thus, in *Att.-Gen. v. Floyer*, 2 Vern. 748, where six trustees were empowered, when reduced to three, to fill up the vacancies, and all died but one, it was held competent to the survivor to execute the appointment, which he was bound to have made at an earlier period. To the same effect is the

dictum of Chief Baron Eyre in *Dupleix v. Roe*, 1 Amst. 86, that where a quorum for election was specified, the trustees, when reduced to that number, were compellable to elect. See the Scotch cases, *infra*, p. 265. On the construction of special clauses in powers of assumption, see Lewin, Tr., 4th Ed. 424-8.

(b) *Blain v. Paterson*, 28 Jan. 1836, 14 S. 361.

(c) *Miller v. Black's Trs.*, 2 S. & M'L., p. 889.

culty (a). It seems best, therefore, to leave powers of assumption to be exercised, when necessary, by a sole accepting or surviving trustee; although to other effects a sole trustee may very properly be prohibited from acting.

Execution of
powers of
Assumption.

The assumption of trustees is effected by deed of appointment, which will be effectual though executed on death-bed (b). Mere nomination, however, confers only a personal right to the estate; the title of assumed trustees must be completed, like that of other singular successors, unless the trust disposition is conceived in favour of trustees who may be assumed. The usual mode of investiture is by deed of assumption, whereby the new trustees are formally nominated and appointed, and the trust property conveyed by the original trustees, or by such number of them as are entitled to act in the trust, to and in favour of themselves and the persons assumed, with the like destination and the same provisions for a quorum as are contained in the original trust deed (c). If lands are conveyed, the deed of assumption will contain the usual clauses of resignation and registration, and the title will be completed by recording a notarial instrument under the Act of 1858. The position of assumed trustees, as regards title and interest, is similar to that of additional trustees nominated by the truster himself; and therefore, where the original trustees have only a personal right, the title of the new body will fall to be completed in the same way as that of a mixed body of original trustees, consisting of disponees and also of trustees appointed by simple nomination. In a case of this nature, Lord Cowan observed, "I have generally thought it the safer course for the surviving trustees to execute a disposition in favour of the additional trustees, and for the whole body, original and additional, to obtain infeftment under the feudal clauses" (d). Where the whole

(a) But see *infra*, p. 275-6.

(b) Bell's Pr. § 1995; *Roughead v. Hunter*, 5 Mar. 1833, 11 S. 516.

(c) See *Martin v. Wight*, 3 Feb. 1841, 3 D. 485.

(d) *Mackilligan v. Mackilligan*, 21 Nov. 1855, 18 D. 96. In *Warburton v. Sandys*, 14 Sim. 622, 14 L. J. Ch. 431, Sir L. Shadwell, V.-C., expressed his opinion to the effect that an assumed trustee was not invested with

the character of trustee until he had been duly nominated, and the trust property had also been duly conveyed or assigned. But Sir J. Romilly has since decided that transfer of the fund is not necessary to perfect the appointment, or to give the assumed trustee a title to sue for payment of the trust fund (*in re Law*, 4 Beav. 509, 11 L. J. Ch. 118); and it is the general opinion in England that an assumed trustee may

original trustees have predeceased the granter, his Lordship added that the additional trustees would make up their title by constitution and adjudication; which proceeding, or rather a declaratory adjudication (a), would seem also to be appropriate to the case of assumed trustees, in whose favour no valid disposition has been executed by the original trustees. However, a majority of the judges in *Mac-killigan's* case were of opinion, that as regarded trustees nominated by the truster, they, at all events, were entitled to take infestment along with the original trustees upon the deed of settlement (b).

The personal property of the trust will be carried to the new trustees by the general disposition and assignation in the deed of assumption. Public stock and shares should be transferred, in the books of the company, into the names of the new body. If the original trustees have also been confirmed executors, it is considered that their functions as executors terminate with the collection of assets, payments of debts, etc.; after which, the character of executor becomes merged in that of trustee,—as is evident, indeed, from the maxim, that an executor, after payment of debts, is a trustee for all concerned. There is no necessity, therefore, for any new appointment of executors, nor does such an appointment appear to be competent.

Completion of Titles in the persons of Assumed Trustees.

If, in consequence of supervening incapacity or non-residence, a quorum of the accepting and surviving trustees cannot be got to concur in an assumption, the surviving acting trustees or trustee may execute a deed of assumption alone. In *Nisbet v. Fraser* (c), one of two surviving trustees having gone abroad, the Court did not refuse to appoint a judicial factor, holding that the trustees were bound, by the directions of the deed, to have executed an assumption as soon as their number became reduced to two, and that there were doubts as to the power of the resident trustee to act alone. But in a more recent and carefully considered case, where the validity of a deed of assumption executed by one of two surviving trustees was questioned, the other trustee having gone abroad, the Second Division, on the report of Lord Cuninghame, decided that

When Assumption may be executed by less than a Quorum.

exercise a power of sale, although the property has not been vested in his person by conveyance (Lewin, Tr., 4th Ed. 422).

(b) See the Lord Justice-Clerk's opinion, 18 D. 90.

(c) *Nisbet v. Fraser*, 31 Jan. 1835, 13 S. 384.

(a) Parker, Adj. 85.

the assumption was valid; and Lord Justice-Clerk Hope referred to the case of *Nisbet v. Fraser*, as establishing that a party resident out of the country was *not* to be considered as a trustee to the effect of the trust being taken to be full (a). Where a power to assume was conferred in case of non-acceptance or failure, "before the purposes of the trust are fulfilled," and certain of the trustees had *predeceased* the testator, the accepting trustees were found entitled to assume others in place of those who had died (b). A similar construction of powers of substitution has been adopted in England (c).

Assumed
Trustees not
persona pre-
dilecta.

Although the position of an assumed trustee, while he continues to hold the office, is precisely the same as that of an original trustee, yet the Court will in some cases more readily entertain an application for his removal from the office; because, in removing him, they do not consider that they are interfering in any degree with the selection of the testator (d). On the other hand, the Court will not in general appoint a factor, if adequate means are provided for carrying on the trust by assumption (e).

Resignation
may be condi-
tional on As-
sumption.

Powers of assumption are frequently coupled with a provision for enabling trustees to resign. Where this is the case, it may be incumbent on the retiring trustee to see to the appointment of his successor; because the resignation of this office is always viewed with jealousy by the Court, and it might be held that the exercise of the right to retire was conditional on the trustees' being able to arrange for filling up the vacancy. A testator may naturally be unwilling to confide in the discretion of too limited a number of trustees; and though he may be desirous of giving facilities for their retirement on reasonable grounds, he may be presumed to expect that means will be taken, in conformity with the powers which he confers, to have the original number restored. Sometimes there is a direction to trustees to convey, at the expiration of a specified period, to persons of a certain class, who are to hold the property for the purposes of the trust. Such persons, who may be denominated

(a) *Watson v. Crawcour*, 17 Feb. 1844, 6 D. 687.

(b) *Stevenson v. Ewing*, 12 Dec. 1849, 12 D. 340.

(c) *Lewin, Tr.*, 4th Ed. 426.

(d) *Pet. Macpherson*, 19 Dec. 1840, 3 D. 315.

(e) *Pet. Dunlop*, 11 Mar. 1835, 13 S. 681.

trustees of the second order, when not mentioned *nominatim* in the deed, are not regarded as *personæ dilectæ* (a).

In trusts of lengthened endurance, it is not unusual to make provision for continuing the trust by other means than assumption. Allusion has already been made to the vesting of trust property in corporations, or in public officers and their successors. Another mode of continuing trusts is by giving a power of nomination to the beneficiary, or to some neutral party. Where property is destined to the use of a religious association, or to augment a charitable fund, the nomination of new trustees may be entrusted to the members or office-bearers of the association. Where the destination is to trustees *nominatim*, whom failing, to any person to be nominated by the Court of Session, the Court will not consider themselves bound to appoint a trustee under the powers of the trust deed; but may, on the application of the parties interested, appointed a judicial factor, with the usual powers (b). Provisions for the election of trustees in permanent trusts will be liberally construed. Thus, where a chapel trust deed provided in general terms for the election of new trustees, the Court remitted to the male members of the congregation to make an election, and afterwards confirmed the appointment (c).

Power of Election may be vested in Corporation, Beneficiary, or in the Court.

By the 74th section of the Bankruptcy Act (d), the creditors upon sequestrated estates are entitled to elect a new trustee in the event of a vacancy occurring by retirement or otherwise. And if a trustee, after being elected, refuse to accept, the Court, on an application by petition, will remit to the creditors to elect a successor (e). In voluntary trust deeds for behoof of creditors, it is usual to provide for the continuance of the trust by empowering the creditors to elect a new trustee, if necessary. If it is intended to substitute the newly-elected trustee in the place of the original trustee, the object will be attained by a deed of devolution executed by the

Election of new Trustees in Bankruptcy.

(a) Pet. *Macpherson*, *supra*.

(b) Pet. *Robertson*, 7 Feb. 1833, 11 S. 365.

(c) Pet. *Morison*, 18 Jan. 1834, 12 S. 307; 11 Mar. 1834, 12 S. 547. Lord Eldon, in deciding *Foley v. Wontner*, 2 Jac. & W. 245, doubted whether vacancies in chapel trusts could be filled up either by the sur-

living trustees or by the congregation, if the prescribed period for election had passed; and thought that, in that event, the power of appointment would devolve upon the Court.

(d) 19 & 20 Vict. cap. 79; see §§ 67-76.

(e) Pet. *Mitchell*, 28 Jan. 1860, 22 D. 632.

latter in favour of his successor. An example of this sort of arrangement, and of the methods pursued for explicating the trust, will be found in the report of the case of *Earl of Lauderdale v. Earl of Fife* (a). While it is certainly a most judicious arrangement in trusts for creditors, as well as in trusts to hold property for associations, etc., to vest the power of changing the trustees in their constituents, we cannot recommend the system as one that is suitable in testamentary or family trusts. Most gentlemen would be chary about undertaking a trust at all, if they knew that they were liable at any time to have additions to their number forced upon them by beneficiaries, without regard to their own wishes, or to the probability of their being able to co-operate with the new trustees. The method of assumption by the trustees themselves is the one most likely to be agreeable to the trustees, and to secure responsibility.

In Marriage-
contract
Trusts, the
Settlor may re-
appoint.

In *Lindsay v. Lindsay* (b), all the trustees under an ante-nuptial contract having failed by death or resignation, and an application having been made to the Court by the spouses and their children for an appointment of new trustees, it was suggested by Lord J.-C. Hope that a sufficient radical right remained in the trusters to entitle them to make a nomination of new trustees themselves. An action of declarator was accordingly raised, at the instance of Mr and Mrs Lindsay against their children, for that purpose; and the case having been reported to the Inner House, their Lordships found and declared that the pursuers had power, and were entitled, to make a nomination and appointment of new trustees, with all the powers, privileges, rights, and faculties conferred upon the original trustees by the contract of marriage libelled on. In this case the radical right alluded to extended no further than to the administrative part of the trust, the duties of the trustees being to hold heritable property for behoof of the spouses, and ultimately to convey the fee to Mrs Lindsay and her heirs. In a later case, where a trustee and *sine qua non* under a marriage-contract had declined to accept, a declarator was brought to have it found that the pursuers had power, and were entitled, to make a nomination and appointment of new trustees under the contract.

(a) *Earl of Lauderdale v. Earl of Fife*, 9 Mar. 1830, 8 S. 675. 1847, 9 D. 1297; *Scott v. Wilson*, 1773, M. 6583, Hailes, 528; *Tovey v. Tennent*, *infra*.

(b) *Lindsay v. Lindsay*, 19 June

The First Division, *causa cognita*, and “in respect of the case of Lindsay,” decerned as craved (a). As it is now settled that the parties to a marriage-contract have power to nominate new trustees, it can scarcely be necessary in future to resort to the machinery of a declarator for the purpose of having the power ascertained.

In whatever form the assumption may have been made, there is still a continuing trust as regards administration and the interests of beneficiaries. The new trustees are bound to render an account of the intromissions of their predecessors as well as their own (b). As regards their *title*, the new body of trustees are quite distinct from the old, to whom they accordingly stand in the relation of singular successors. In *Martin v. Wight*, it was argued that the infestment of assumed trustees accresced to and validated precepts granted by their predecessors—who had all failed—in the character of superiors. But this doctrine, founded on a supposed analogy between trusts and corporations, was repudiated by all the judges of the First Division (c). Lord Pr. Hope and Lord Fullerton also agreed, that if any one of the trustees who had signed the precept had survived, and had been included in the infestment, there would have been considerable difficulty in the question. Lord Mackenzie thought that there might be continuity of title in trusts established by Act of Parliament or Royal Charter, though not in private trusts. The opinions in this case exhibit in a clear light the distinctions between corporations and trusts. As regards the duration of their office, the presumption is, that the trust is meant to continue in the persons of assumed trustees, notwithstanding the failure of all the original trustees; and this construction was accordingly given to a deed which gave power to the trustees to assume others to act along with them (d).

Continuity in the Trust does not impart continuity to the Title of the Trustees.

(a) *Tovey v. Tennent*, 11 Mar. 1854, 16 D. 866.

(b) *Somerville's Trs. v. Wemess*, 8 Dec. 1854, 17 D. 151. No opinion was expressed as to any supposed liability for previous intromissions.

(c) *Martin v. Wight*, 3 Feb. 1841, 3 D. 485.

(d) *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 914, per Lords Medwyn and Moncreiff.

SECTION II.

OF THE APPOINTMENT OF NEW TRUSTEES BY THE COURT.

Question
stated.

Probably no matter connected with the administration of trust estates is more involved in doubt than that of the power of the Court of Session to appoint new trustees. Our opinion is, that the Court of Session does possess the power; though we believe we give expression to the prevailing opinion amongst the profession, in affirming that the Court has used a wise discretion in declining to bring this branch of this extraordinary jurisdiction into use for the purpose of providing for the administration of ordinary family trusts; seeing that by the machinery of a factory their Lordships' powers of supervision over trust estates may be exerted more efficiently and in a more summary manner (a).

Early Cases.

In arriving at this conclusion, we do not attach much weight to the authority of some early cases, decided at a time when the distinction between trusts and factories was perhaps not very clearly defined. We may refer, however, to the case of *King's College, Aberdeen*, where the Court authorized the investment of the fund in the name of the masters of the College, the said masters and their heirs conjunctly and severally being bound to report their proceedings to the Court within six months (b). In *Macdowall v. Macdowal* (c), where the Court refused a prayer for authority to carry on a private trust, on the ground that the purposes had been already fulfilled, it was observed,—and this dictum is referred to by Lord Brougham in the subsequent case of *Millar v. Black's Trs.*,—that the Court would interpose where no person had any immediate interest in the management; and estates destined to charitable uses were mentioned as an instance in point.

Competency
affirmed in
later Cases.

No other case is reported till 1822, when an application was made for the appointment of additional trustees for the management of a fund bequeathed for the support of schools. It appearing

(a) See Bell's Com. 5th Ed. I. 31; *Earl of Wemyss*, M. 14722; Pet. Pr. § 1993, 2. *M'Pherson*, M. 6052; and see Ersk. 1,

(b) *King's College of Aberdeen*, 1741, 6, 21.

(c) *Macdowall v. Macdowal*, 1789, M. 7453. *Hospital of Largs v.*

that, although some of the original trustees had died, there was still a plurality of trustees, the petition was refused *in hoc statu* (a). In *Pet. Moir*, the Court declined to nominate a trustee on the decease of one appointed by a private trust deed, being of opinion "that although in cases where there was an absolute necessity for their interference, the Court would appoint a trustee, there did not exist such necessity here" (b). And on the failure of the trustees under a mortification, the Court appointed the kirk-session of the parish "factors to execute the will," they having offered to act as trustees, provided an allowance were made to their clerk for his services in managing the fund (c). Still later, the Court, on the authority of an unreported case, remitted to the members of a congregation to elect trustees for holding the property of their chapel, the provisions for a substitution of new trustees under the trust deed having become inapplicable. On the election being reported to the Court, they confirmed it, and granted warrant to the surviving trustee to execute all necessary deeds for vesting the property in the new body (d). It will be observed that this was, in point of law, an appointment of trustees by the Court, although the suggestion of the individuals whose election was approved of was naturally left to the congregation. In *Miller v. Black's Trs.* there was a destination to trustees for charitable uses; and it was argued that the heir-at-law was entitled to defeat the settlement, on the ground that there was no means of continuing the trust beyond the lives of the *original* trustees, and of such persons as they might assume. The power of distribution being of a discretionary nature, could not, it was said, be exercised by a judicial factor. Lord Brougham, in delivering judgment, explained that the powers of assumption might be extended by implication to the new trustees, and added, "But there is a sufficient power in the Court of Session to provide for continuing the trust, in a case of this description, had there been no such clause;" a doctrine which his Lordship defended by a minute review of the previous cases (e).

(a) *Pet. Marjoribanks*, 27 Feb. 1822, 1 S. 355.

(b) *Pet. Moir & Ors.*, 6 July 1826, 4 S. 801.

(c) *Pet. Falconer*, 4 Dec. 1830, 9 S. 142.

(d) *Pet. Morison*, 18 Jan. 1834, and 11 Mar. 1834, 12 S. 307 & 547.

(e) *Miller & Ors. v. Black's Trs.*, 14 July 1837, 2 S. & M'L. 889, *affd.* 14 S. 555.

*Melville v.
Baird Preston.*

The general question was thereafter most carefully considered in the case of *Melville v. Lady Baird Preston* (a). The settlor in this case had executed an entail of his heritable estates; and by a relative trust deed he declared that the beneficial operation of this entail should be suspended during the lives of his three nieces, during which period the property was to be administered and the rents to be applied in fulfilment of the purposes of the trust. The trust deed contained a general disposition of the settlor's heritable estate, and gave large discretionary powers to the trustees, including a power to fit up the mansion-house for the heirs of entail, with furniture and plate "according to their own discretion," and also a direction to hold a sum of L.10,000 at the pleasure of his three nieces, and the survivor of them, to be laid out in improvements. The trustees declined to accept; and certain of the beneficiaries, conceiving that the entails were merely burdens on the trust—as was afterwards decided by the Court—petitioned for the appointment of new trustees. The Court nominated and appointed the parties suggested "to be trustees for executing the different powers, and carrying into effect the provisions contained in the trust disposition and deed of settlement and will" of Sir Robert Preston, "and that in room and place of the trustees named by the said Sir Robert Preston, who have declined to accept, and with all the powers and faculties conferred upon the said original trustees by the said trust deed." The new trustees having brought a formal process of declarator for having the heritable property vested in their persons, the action was opposed by Lady Baird Preston on the ground that the Court had exceeded its powers in making the appointment, but the defence was unanimously repelled. Lord Gillies said—"If it were necessary to decide it, I am clearly of opinion that we have the power of appointing a trustee, where a necessity exists for it, and that it is very useful and beneficial that such a power should exist in this Court." Lord Mackenzie observed—"We have ample power to appoint a trustee, wherever a necessity exists for making such an appointment; and there was a necessity for it in this case." Lord Corehouse held, that "the Court have a power to appoint trustees where a case of necessity emerges;" and Lord President Hope, while laying weight, in com-

(a) *Melville v. Lady Baird Preston*, 8 Feb. 1838, 16 S. 457.

mon with the other judges, on the previously expressed consent of the parties, added—"And the Court could have appointed trustees, even without the consent of the parties." In the House of Lords the question seems to have been decided on the ground that the appointment was *res judicata* between the parties, the proceedings under the original petition not having been opened up by reduction or appeal. Lord Cottenham, C., said that he thought it unnecessary to consider whether the Court of Session had power to appoint new trustees, because in this case the pursuers had been appointed trustees with the consent of the appellant, and the appointment, he said, "stands in full force, and whilst it so stands, the title of the pursuers under it cannot be disputed by the appellant" (a).

The later cases which are considered to have thrown discredit on the authority of *Preston's* case, appear to us to leave the principle untouched; the question raised in these cases, having had relation merely to the expediency of appointing trustees under private trust settlements.

In *M'Aslan's* case, the First Division, with consent of the beneficiaries, appointed trustees, with the whole powers contained in the trust disposition; the original trustees having all died, and it being represented that the purposes of the trust were such as to render it one of considerable endurance (b). And, in a trust for behoof of married persons and their children, the Court, on the death of the original trustees, appointed new trustees under the disposition, "with the whole powers thereby conferred on the original trustees now deceased, they always finding caution before extract, in terms of the Act of Sederunt anent factors" (c). But where the only obstacle to the termination of a family trust was the existence of an annuity, the Court refused to appoint trustees; Lord President Boyle observing—"We are not fond of appointing trustees. We have no good securities that the work will be well done; and in this case, I propose that the party should only be nominated judicial factor, with the usual powers" (d). In *Lindsay's* case, which was a marriage-contract trust, Lord Cockburn said—"Assuming that we

Authority of
Preston's case
recognised.

(a) 8 Cl. & Fin. p. 16, 2 Rob. 45.

(c) Pet. *Glasgow*, 5 Dec. 1844, 7 D.

(b) Pet. *M'Aslan & Ors.*, 17 July 1841, 3 D. 1263.

178.

(d) Pet. *Bain*, 30 June 1846, 8 D. 942.

Appointment
of Factor con-
sidered more
expedient.

have power to nominate new trustees, it would require a strong case to make us exercise it; and a strong case cannot be said to exist where the parties can do it for themselves" (a). Then in *Pet. Nicholson* (b), on the failure of trustees appointed by a marriage-contract, the First Division, on the application of one of the spouses, declined to appoint new trustees, but nominated a judicial factor. And again, when *Preston's* case came before the Court the second time (c), on a petition for the appointment of a new trustee to supply a vacancy in the trust, the judges of the First Division did not seem disposed to recede from their former position in reference to such appointments. Lord Ivory, indeed, remarked, that of late years the Court had discountenanced the practice of appointing trustees; and, if the question had been open, he should have had great doubts as to the propriety of appointing these trustees at all. But Lord President M'Neill's statement of the law was, that "the Court will interpose to name trustees only in cases of necessity, where danger is to be apprehended if the Court do not interpose. The case before us does not come up to that; it is put entirely on convenience." He added as an illustration, that if one of the two remaining trustees were going abroad for a time, he might not refuse such an application (d).

Appointment
of Trustees for
the manage-
ment of Char-
ities;

In *Ferguson v. Marjoribanks*, the Court were asked to find that "it is competent for our said Lords to nominate and appoint such and so many persons as to them shall appear fit and proper" for the administration of an endowment of a grammar school. The Court held, that the original nomination of certain parties and their heirs had not failed, and the action was accordingly dismissed as unnecessary; the only indication of opinion on the merits being an observation of Lord Ivory, to the effect that the Court of Session is itself the trustee when a trust has lapsed, and, as such, assumes the right of appointing a judicial factor (e). The difficulties attending the appointment of trustees were also alluded to by Lord Deas, in a petition founded on an ante-nuptial contract, and praying for the appointment of a judicial factor to hold a sum of L.3000, which the

(a) *Lindsay & Spouse v. Lindsay*, 19 June 1847, 9 D. 1299. See *ante*, p. 268.

(b) *Pet. Nicholson*, 29 Jan. 1850, 12 D. 911.

(c) *Preston v. Preston's Trs.*, 7 July 1852, 14 D. 1055.

(d) 14 D. 1056.

(e) *Ferguson v. Marjoribanks*, 1 April 1853, 15 D. 645.

lady's father had become bound to pay at the first term after his death, for behoof of the spouses in liferent, and the children in fee. No trustee, however, had been nominated in the contract, and the executor could not secure the children's interest except through the intervention of a trust. The Court declined to name a trustee; but appointed a judicial factor with the usual powers (a).

The ground of the refusal to appoint, in the sequel of *Preston's* case, deserves attention, from its bearing on cases as to charitable administration. The Court, having already appointed trustees with all the powers and faculties conferred by the truster, including a power of assumption, refused an application for the appointment of a new trustee to supply a vacancy, on the ground, as stated by the Lord President M'Neill (b), that the surviving trustees nominated by the Court *might exercise the power of assumption*, and that no reason had been stated for seeking the intervention of the Court. This consideration obviously suggests a reason for the appointment of new trustees rather than a factor in trusts of lengthened endurance, *e. g.*, for charitable purposes. By appointing trustees, the trust is saved the expense of a salaried management; and the trustees may at the same time be enabled, under the powers of the decree of constitution, to transmit their office to successors, instead of leaving it, as a factor must do, to be filled up, as accident might direct, by any one who cared to make the necessary application to the Court.

We refer to our chapter on Charitable Trusts for an account of the more recent cases in which the Court has appointed trustees, under the name of managers, for the execution of charitable trusts (c).

The observation of the Lord President in *Preston v. Preston's Trs.*, as to the course which might be taken in the event of one of two trustees leaving the country (d), leads us, in conclusion, to the consideration of a class of cases in which the Court has empowered trustees to execute the trust alone, in consequence of the death or non-residence of other trustees. The Court has the power of appointing an additional trustee to act along with an original trustee whose

with powers of Assumption.

Recent authorities.

Court may grant powers to diminished number,

(a) Pet. *Melville*, 8 Mar. 1856, 18 D. 788.

(b) Lord Colonsay, 14 D 1056.

(c) See Chapter XX. (Charitable Trusts).

(d) *Preston v. Preston's Trs.*, 14 D. 1056.

in case of Insanity;

Bankruptcy;

Non-residence.

colleague has become incapable of acting. This course seems preferable to that of appointing a factor; on the principle laid down in *Findlay's case* (a), that the nomination of the truster should be respected; but we cannot point to any case in which the Court has exercised the power of nominating additional trustees. The actual course of practice has not been uniform. In one case, where the trust settlement was conceived in favour of trustees and the survivor, and one of two surviving trustees became insane, the First Division granted warrant and authorized the petitioner (the acting trustee) to bring the aforesaid trust to a conclusion, as sole trustee capable of acting therein, and to act with the full powers and for the purposes expressed in the trust deed, caution being duly found (b); and again where one of three trustees had died, and another was sequestrated and refused his concurrence to the execution of a trust, the First Division, agreeably to their former decision, authorized the third trustee to wind up the trust, with the full powers conferred on the trustees or survivor, on condition of his finding caution (c). But, in a similar case, where an assumed trustee prayed the Court either to nominate a new trustee to act along with her in place of the incapable trustee, or otherwise to authorize the petitioner to execute by herself the purposes of the trust, the Second Division refused the prayer; and Lord Justice-Clerk Hope observed—"The Court are here called upon to exercise an extraordinary power where it is quite unnecessary. The appointment of a new trustee, I am aware, is a thing which has been done, but it is most inexpedient and unadvisable." A factor was afterwards appointed in terms of an amended prayer (d). Where the difficulty arose from a trustee having gone abroad, we have already seen that the remaining trustee was found entitled to act alone to the effect of assuming a colleague in the trust (e); but in a later case, in which the authority of the resident trustee was doubted, the Court appointed a judicial factor (f). In the earlier case of *Cowan v.*

(a) Pet. *Findlay & Ors.*, 30 June 1855, 17 D. 1014.

(b) Pet. *Fraser*, 1 Mar. 1857, 15 S. 692.

(c) Pet. *Millar*, 19 Jan. 1854, 16 D. 358.

(d) Pet. *Watt*, 13 June 1854, 16 D. 942.

(e) *Watson v. Crawcour*, 17 Feb. 1844, 6 D. 687.

(f) *Lauder v. Lauder's Trs.*, 12 Nov. 1851, 14 D. 14.

Crawford, it was ruled that where the beneficiaries had an interest to support the administration, it was not to be considered as dissolved even by the death of one trustee, the absence of another from the country—to whom a *curator bonis (loco absentis)* had been appointed—and the bankruptcy of the third. The absent trustee might still return and claim the administration, as he had never been superseded or debarred from exercising his office (a).

The Court will not appoint a new trustee, or authorize one of several to act alone, where discretionary powers are to be exercised (b). *Secus*, where the Trust is discretionary.

Where trustees cannot agree in the management, the Court will interpose for the protection of the estate. In *Laird v. Nicholl*, they refused, on special grounds, to sequester the trust estate; Lord J.-C. Hope observing, that “if a meeting of trustees were called, and only two appeared, and they differed, there might arise a case for our interference, but no such case had yet arisen” (c). And accordingly, where a body of trustees were equally divided as to the management, two against two, the Court, of consent, appointed a judicial factor (d). And where two trustees differed *in limine* as to the propriety of assuming additional trustees, the Court, on the application of the beneficiary, appointed a judicial factor (e). Interposition of Court where Trustees differ as to the management.

SECTION III.

OF THE RESIGNATION OF TRUSTEES.

To complete the subject of the devolution of the office of trustee, we have still to consider the mode in which an individual may divest himself of the character of trustee without thereby putting an end to the trust. Three distinct means have been recognised by English lawyers, by which the object in question may be attained: *First*, the trustee may obtain the consent of all the parties interested; or, Sources of authority to resign.

(a) *Cowan v. Crawford*, 20 Jan. 1837, 15 S. 398.

(b) Bell's Pr. § 1993, 2; *Ireland v. Glass*, 18 May 1833, 11 S. 626; *Nisbet v. Fraser*, 31 Jan. 1835, 13 S. 384.

(c) *Laird v. Nicholl*, 7 Dec. 1833, 12 S. 187.

(d) *Adie v. Mitchell*, 19 Dec. 1835, 14 S. 185.

(e) *Forbes v. Forbes*, 14 Feb. 1852, 14 D. 498.

secondly, he may retire by virtue of a special power contained in the instrument creating the trust; or, *thirdly*, he may obtain his release by means of an application to the Court. To these sources of authority we must now add *fourthly*, the authority of statute. It will afterwards be seen that the interposition of the Court of Session for the purpose of liberating a trustee from his engagements, is a remedy more sparingly granted by the Court of Session than by the Court of Chancery.

At common law trustee cannot resign.

At common law, a trustee, unless acting under special powers to that effect, could not take upon himself to resign his office, even upon reasonable grounds; and still less would an arbitrary or capricious withdrawal be permitted. In the case of *Watson v. Crawcour*, indeed, permanent residence in a foreign country was regarded as equivalent to resignation. But the report shows that, in deciding the point, the judges were desirous of putting that construction upon the trustee's absence, which would be attended with least disadvantage to the estate; and in the case in question, it was necessary to hold him as having resigned, in order that the resident trustee might have liberty to act by himself. At most, this case only proves that the Courts have power to remove an absent trustee, or to hold him as having *de facto* resigned; it certainly does not warrant the conclusion that a trustee may escape from all responsibility for future acts of management by merely quitting the country, without having used the means of obtaining an effectual discharge by either of the methods we are about to notice.

Resignation by consent of the Beneficiary.

1. As it would be contrary to equity to allow any beneficiary to complain of the consequences of an act to which he had been an assenting party, it follows, that if all the beneficiaries are *sui juris* (a),

(a) In *Wilkinson v. Parry*, 4 Russ. 272, the trustees were bound by the deed, if they relinquished the trust, to transfer the property to the joint names of a *new trustee* and the continuing trustee; and one of the trustees having retired without procuring the appointment of a successor, Sir J. Leach, M. R., held him responsible for the misuse of the trust funds; although it appeared that the widow and such of the family as were major had as-

sentent to the arrangement. "Nothing could relieve the trustee," said the M. R., "from his obligation, but the consent of all parties interested in the trust. It was not possible to obtain such consent here, because there were infants, who were not capable of consenting, and therefore could not be deprived of that security which they derived from having the trust property confided to the care of two trustees instead of one" (4 Russ. 276).

and that all concur in sanctioning the resignation of a trustee, he may retire without involving either himself or his colleagues in any new responsibility. But before giving their consent to the contemplated resignation, the beneficiaries would naturally wish to be assured that *their* interests were not likely to suffer by the arrangement. Unless the resignation were effectual, as against the public as well as against the beneficiaries, it would be worse than useless; because it would leave all the subsequent deeds of the trustees open to challenge, as having been executed without the consent of a legal quorum. It is not, therefore, unimportant to observe that the resignation of a trustee, with concurrence of the beneficiaries, is binding on all parties. Accordingly, where one of three trustees had resigned, and his resignation had been accepted by his co-trustees, and thereafter a second trustee resigned and his resignation was accepted by the remaining trustee, who thereupon assumed two new trustees in pursuance of powers conferred, and the whole proceedings were subsequently approved and confirmed by the testator's family, the beneficiaries under the trust; and it was objected, on the part of a purchaser from the new body of trustees, that they were not *in titulo* to sell, the resignation being conceived to be *ultra vires*, because not specially authorized by the trust deed,—the Court, “in respect of the special circumstances of the present case, and likewise of the ratification and concurrence of all those interested in the trust,” sustained the title (a). The report in the case of *Hill v. Mitchell* does not bring out any “special circumstances,” except that both trustees had a reasonable cause for resigning, the one being in bad health, and the other having differed with his co-trustees. The resignations were made by letter. The opinions of the judges show, that the concurrence of the beneficiaries and of the other trustees was the important circumstance which gave validity to the resignation. Lord Mackenzie, for example, says, “It is said that there must be an application to the Court. No doubt that is the best course. We sustain all kinds of declarators, and a declarator of that sort would be a valid action; but I would hesitate to say that it is absolutely necessary. A resignation made on the one hand, and accepted on the other, or a

Hill v. Mitchell.

(a) *Hill v. Mitchell & Ors.*, 9 v. *Beveridge*, 29 Nov. 1833, 12 S. Dec. 1846, 9 D. 239; see also *Freen* 141.

resignation called for by the other trustees, or by the beneficiaries, and acceptance made on that call, and the trust going on after the resignation, I don't see why that resignation should not be sustained" (a).

Mode of effectuating resignation.

The decision in *Hill v. Mitchell* ought to remove all doubts as to the power of a trustee to execute a valid and effectual resignation during the continuance of the trust, with consent of the co-trustees and all the beneficiaries. To make the resignation perfectly unchallengeable, it should be by deed, setting forth the cause of resignation, and embodying a consent by all the parties interested. But it appears from the decision referred to, that an informal resignation accepted by the trustees and homologated by the beneficiaries may be sufficient. It must, of course, be kept in view, that if there are minor beneficiaries, it will be impossible to obtain a legal consent on their part. There is no reason to suppose that a consent by guardians would be binding, because the trustee is himself in the position of a guardian *quoad* the trust property, and must not presume to advise his ward in a matter so closely affecting his own interest and responsibility. The existence of a beneficial interest in persons *nascituri*, will also be a bar to resignation by consent. If the trustee has become a party to a litigation, he cannot withdraw without the consent of the opposite party, although the beneficiary be willing to be substituted in his place (b).

Resignation under the authority of the Truster.

2. The next and most usual mode of enabling a trustee to resign, is by a power to that effect inserted in the trust deed. By the Trustee Act, 1861 (c), every private trust deed—unless where the contrary is expressed—is, for the future, to be held to include a power of resignation. Express powers are usually coupled with provisions for enabling the surviving or continuing trustees to substitute new trustees in room of those who may die, or resign, or become incapable of acting; and the right to resign is sometimes made contingent on the consent of the other trustees being obtained. Where such a power is given, the trustee may resign even after an action has been raised against him; and he is entitled to be assoilzied in respect of his resignation, if he found upon it in his

(a) 9 D. 244.

(c) 24 & 25 Vict. cap. 84, § 1.

(b) *Stephenson's Trs. v. Marq. of Tweeddale*, 11 Mar. 1823, 2 S. 287.

defences (a). In practice, it is by no means uncommon for a trustee to retire during the continuance of a trust, when such retirement is authorized by the deed of constitution.

Express powers.

3. If a trustee has not received the necessary authority from his constituent, and is unable to obtain the consent of all the beneficiaries to his resignation, he will be allowed to retire, on cause shown, upon an application to the Court of Session. This doctrine, which was first distinctly laid down in the case of *Hill v. Mitchell*, has been more recently acted on by the First Division in *Pet. Gordon (b)*, and by the Second Division in *Dick's Trs. v. Pridie (c)*. In the latter case, the Court pronounced an interlocutor, finding "that, in the circumstances stated in the said report, as to the state of health of the defender, Peter Hampden Pridie, he is entitled to be relieved from the office of trustee under the trust deed and settlement of the late Mrs Jean Dick, and therefore discharge and exoner him of the said office," etc. In *Gordon's* case the application was by petition, stating that the applicant, who was an assumed trustee, had gone to reside in England, and was desirous of resigning his office; and praying for authority to that effect and for exoneration. Intimation having been made to the trustees (d), the Court, "in respect no answers to the petition had been lodged, allowed the petitioner to resign."

Court may authorize resignation in case of necessity.

As regards the circumstances and grounds which entitle a trustee to be judicially discharged of his office, it is understood that the practice in England is more favourable towards trustees than that which the theory of our law is supposed to sanction. The doctrine of the law of England was thus explained by the present Master of the Rolls (e):—"It is quite clear that any circumstances arising in the administration of the trust which have altered the nature of his duties, justify a trustee in leaving it, and entitle him to receive his costs; but the circumstances must be such as arise out of the administration of the trust, and not those relating to himself individually" (f). Now it is extremely doubtful whether an unexpected

Grounds on which Resignation allowed by the Court.

(a) *Gilmour v. Gilmour's Trs.*, 7 Feb. 1852, 14 D. 454.

(b) *Pet. Gordon*, 2 June 1854, 16 D. 884.

(c) *Dick's Trs. v. Pridie*, 9 June 1855, 17 D. 835.

(d) Intimation to the beneficiaries was afterwards directed.

(e) Sir John Romilly.

(f) *Forshaw v. Higginson*, 20 Beav. 486. In *Courtenay v. Courtenay*, 3 J. & Lat. 533, the Lord Chancellor of

alteration in the nature of the duties undertaken by a trustee in Scotland would be held to entitle the Court to relieve him of the onus. On the other hand, the cases of *Dick v. Pridie* and *Gordon*, just cited, rather tend to show that changes in the position of the trustee himself, such as ill health or non-residence, unfitting him for the performance of the trust, would entitle him to obtain his discharge; and, contrary to the English rule just stated, he would seem to be entitled to charge his expenses against the trust estate.

Resignation
under the
powers of the
Trustee Act.

4. A trustee may now resign under the powers conferred by 24 & 25 Vict. cap. 84. Doubts have been entertained as to whether the powers of the Trustee Act extend to trusts in operation before the date of the Act, 6th Aug. 1861; and until the question is determined we think that trustees could not be advised to incur any risk by assuming that the Act has a retrospective operation. In *Urquhart v. Urquhart* it was observed by Lord Cranworth (a), as a general proposition, that *prima facie*, retrospective legislation is not to be presumed; and great injustice would often be occasioned by it. But the point actually decided was, that the 43d section of the Entail Amendment Act—declaring that entails defective in one prohibition should be held invalid as to all the prohibitions—was not retrospective in the sense of validating an alteration in the investiture by deed executed prior to the date of the Act. It was never doubted that the clause applied to pre-existing entails. That case is, therefore, an authority for the proposition that an ultroneous deed of resignation of date prior to the Trustee Act, would not be validated by the operation of the Trustee Act. It does not lead to the inference that the statutory power might not now be exercised by a trustee whose appointment was antecedent to the statute. It is to be observed that the powers of resignation and assumption, conferred on trustees by the 27th section of an English statute, 23 & 24 Vict. cap. 145, are by a subsequent section (§ 34), made to extend only to persons acting under settlements *executed* or republished after the date of the statute.

Ireland (Sir E. Sugden) observed: A trustee applying for authority to resign was not bound to show that another person was ready to accept the office; but that, if no one could be found to

accept the trust, the Court might be obliged to retain the old trustee, but would take care to protect him.

(a) 1 M'Q. 662.

CHAPTER XV.

OF THE TITLE AND ESTATE OF THE TRUSTEE.

THE questions to be considered are, *first*, the quality of the estate taken by the trustee; *secondly*, the manner of completing titles to trust property in the person of the trustee or of his successors.

SECTION I.

OF THE QUALITY OF THE TRUSTEE'S ESTATE.

The first point to be considered, is the quality of the estate vested in the trustee under an express trust of heritable or moveable property; that is, where the conveyance itself bears to be in trust for purposes either embodied in the deed, or to be afterwards declared.

The trust estate is then of the nature of a limited fee; the limitations being determined by the nature of the trust purposes; which are binding as *conditions of the grant*, upon those into whose hands the estate may pass, as actual or constructive trustees. In one view, a trustee may be said to be armed with all the rights and powers of a fee-simple proprietor, though he is restrained by the terms of his appointment from exercising certain of these rights, which thus remain dormant during the continuance of the trust. If the ultimate purpose is a conveyance to a beneficiary of the fee-simple estate, with all its legal properties, these properties are held in the meantime to reside in the person of the trustee; when again the purpose is a reconveyance to the granter, the fee is held to remain with him, and the trust is merely a burden.

Trust is a
limited Fee.

Quality of the
Estate stated
by Bell.

The nature of the legal estate in the trustee was described by Prof. G. J. Bell in his *Principles of the Law of Scotland* (a), where the constitution of the fiduciary relation is shown to be dependent on the following principles:—"1. That a full legal estate is created in the person of the trustee, to be held by him against all adverse parties and interests, for the accomplishment of certain ends and purposes. 2. That the uses and purposes of the trust operate as qualifications of the estate in the trustee, and as burdens on it, preferable to all who may claim through him. 3. That those purposes and uses are effectually declared by directions in the deed, or by a reservation of power to declare in future, and a declaration made accordingly. And 4. That the reversionary right, so far as the estate is not exhausted by the uses and purposes, remains with the truster, available to him, his heirs, and creditors."

Creditors of
the Trustee
have no in-
terest under
the Bankruptcy
Act;

If a bankrupt trustee, whether testamentary or otherwise, has kept the trust estate distinct from his own funds, his creditors can have no separate claim to it; nor does the estate become vested *even nominally* in the trustee of the sequestration. But if a trustee become bankrupt while in the possession of trust funds not distinguished, his constituents can only claim a dividend (b). By § 102 of the Bankruptcy Act, the vesting of the bankrupt's moveable estate in the trustee, is expressly limited to such estate and effects, "so far as attachable for debt" (c)—an expression which will exclude property held in trust; and with regard to heritable property it is provided, that "if any part of the bankrupt's estate be held under an entail, or by a title otherwise limited, the right vested in the trustee shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey, or the creditors attach." The observation applies not only to express trustees, but to judicial factors, tutors, and other persons in whom property may be legally vested for behoof of others.

English Bank-
ruptcy Act.

The vesting clause of the English Bankruptcy statutes carries property situated in Scotland. Its application as to trust property is excluded also; as explained by Lord Chief-Justice Willes, who

(a) Bell's Pr. § 1991.

(b) *Leck v. Gairdner*, 7 July 1855,
17 D. 1075. See remarks on the

effect of trustees investing the trust
money in trade, *infra*, p. 286.

(c) 19 & 20 Vict. c. 79, § 102.

observes, that "nothing vests in the assignees, even at law, but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest, and which is to be applied to the payment of the bankrupt's debts" (a).

If an insolvent trustee has both a fiduciary and a *beneficial interest* in property legally vested in him, Mr Lewin observes, on the authority of several English cases, that the property passes to the assignees, who take as trustees for the creditors and other parties interested (b). He is of opinion, however, that this rule could not apply to the case of a party expressly nominated a trustee, and who may have some partial beneficial interest in the trust. We concur in this opinion, conceiving that the more regular course would be for the Court to appoint a judicial factor (or, in England, a trustee), in place of the bankrupt, the trustee on whose estate could then put in a claim for his beneficial interest under the factory. The bankrupt's trustee would clearly be *in titulo* to apply for the appointment of a factor; and, under this form of procedure, the limitation imposed by the 102d clause of our Bankruptcy Act, as to the nature and extent of the estate taken by the trustee, would be satisfied.

Title, where Trustee has also the Beneficial Interest.

Where the possession of property confers any right or privilege, the trustee of the property may exercise it, unless debarred by statute. Thus it has been held in England that a trustee may present to a benefice, though he will be bound in equity to observe the directions of the beneficiary (c). A trustee of stock in any public company will be entitled to vote as a proprietor; and in practice it is quite understood that he may hold the office of director, if elected. A trustee is of course entitled to vote as a creditor on the sequestrated estates of a debtor to the trust; and it is now decided that he may exercise this right before confirmation (d). A trustee of heritage has also, at common law, the right of entering vassals; and the rule extends to trustees for payment of debts, although in this case the radical right is said to remain with the truster (e). It would rather appear that, at common law, a trustee

The Estate carries with it all Personal Rights and Privileges.

(a) *Scott v. Surman*, Willes, 402; Lewin, Tr., 4th Ed. 181. (d) *Chalmers' Trs. v. Watson*, 12 May 1860, 22 D. 1060.
(b) Lewin, Tr., 4th Ed. 182. (e) *Ker v. Russell*, 7 Dec. 1838, 1 D. 179.
(c) Lewin, Tr., 4th Ed. 269.

Parliamentary
Elections.

holding a freehold qualification was entitled to vote in the election of a commissioner for the shire. But by 12 Anne, stat. 1, cap. 5, electors were entitled to tender to any person claiming to vote, an oath called "the oath of trust;" and unless the voter was able to swear that he did not hold the property in trust for another, he was disqualified from voting on the election (a). By the existing Reform Act a form of oath is prescribed, which may be tendered to voters at any election for a member of Parliament in Scotland, and by which the deponent must state that he holds the property in question "for my own benefit, and not in trust for, or at the pleasure of, any other person" (b).

Effect of mixing Trust
Money with
Trustee's private means.

As to money or personal funds, if these are kept separate from the private property of the trustee, and are vested in his person as such, they are not liable, at common law, to be attached for his personal debts. But it is otherwise if the trustee have used the property as his own, as, for example, by investing the capital of the trust funds in his business. In the event of the trustee's insolvency, it may be assumed that any balance at his credit would belong to his creditors generally, there being no rule of law, in virtue of which the beneficiaries could lay claim to a preference over trust money so invested. Trustees investing the trust funds in speculations, or keeping the money in their own hands, are guilty of a *breach of trust* (c); and the possibility of the property being thus entirely lost to the beneficiaries was the main reason which induced the Court, in *Cochrane v. Black*, to find the trustees liable to refund, to the full amount of the profits realized through the employment of the trust money in trade (d).

By the 83d section of the Bankrupt Act, any trustee on a sequestrated estate, who shall keep in his hands any sum exceeding L.50 belonging to the estate for more than ten days, is chargeable with interest at the rate of 20 per cent. on the money thus misapplied, and is also liable to summary dismissal from the office of trustee (e).

In connection with this subject, we may notice that the duration of trusts of heritable property is now limited, by the 47th section of

(a) 12 Anne, stat. 1, cap. 5.

(b) 2 & 3 Will. IV. cap. 65.

(c) *Cochrane v. Black*, 1 Feb. 1855,
17 D. 321.

(d) 16 July 1857, 19 D. 1019. See
Chapter XVI., Section 4.

(e) 19 & 20 Vict. cap. 79, § 83.

the Entail Amendment Act (a), to that of a life or lives in being at the date of the settlement. By this enactment it is provided, that where any land or estate in Scotland shall, by virtue of any deed of trust dated after 1st August 1848, be in the lawful possession, either directly or through trustees, of a party of full age born after the date of the deed, the beneficiary shall not only take the estate free from any conditions of the trust designed to regulate his succession, or to limit, restrict, or abridge his possession or enjoyment of the estate, but such beneficiary shall be deemed and taken to be a fee-simple proprietor, and may, upon application by summary petition to the Court of Session, obtain an act and decree declaratory of his right, which decree being recorded in the Register of Sasines, shall have the effect of a disposition with infestment thereon in fee-simple.

A trust disposition of lands for behoof of creditors, with powers of sale, subject to an obligation on the trustee to reconvey, does not in reality, even when followed by infestment, divest the granter of his *radical right* to the estate. The truster, on the contrary, retains a real right in the estate so far as unsold,—a right which may be adjudged by non-acceding creditors (b), and in virtue of which the truster may sell the lands, if the trustee refuse to concur (c), or may even execute an effectual entail of the estate, though it has never been reconveyed to him (d). In the case of heritable property, there is a difficulty in recognising the existence of a real right in the truster, where the disposition is *ex facie* an absolute conveyance, and no back-bond has been recorded. Accordingly it has been laid down, that a trust constituted by unrecorded back-bond from the disponent creates only a personal obligation to reconvey (e). It is clear that the assignee of the trustee would have a preferable right to the assignee of the truster, if his infestment were first in order of time (f). If the truster's assignee were first seised, the question whether his infestment would give a preference, depends

How far the Truster's radical right can be made effectual in Bankruptcy.

(a) 11 & 12 Vict. cap. 36.

(b) *Campbell v. Edderline's Crs.*, 14 Jan. 1814, F. C.; M. "Adj." No. 11.

(c) *Brisbane v. Crawford*, 3 Feb. 1826, 4 S. 422.

(d) *M'Millan, etc., v. Campbell*, 9 S. 551; affd. 14 Aug. 1834, 7 W. & S.

441; *M'Leod v. Mackenzie*, 17 Nov.

1827, 6 S. 77; *Melville v. Preston*, 8 Feb. 1838, 16 S. 457.

(e) *Robertson v. Duff*, 14 Jan. 1840, 2 D. 291, per Lord Fullerton, p. 291.

(f) *Somervails v. Redfearn*, 1 June 1813, 5 Paton, 707.

on the view that may be taken of the nature of the grantor's title. If, as Lord Fullerton considered, the effect of an *ex facie* absolute conveyance is entirely to divest the grantee, leaving him only a *jus crediti*, then the assignees could only acquire a preference by adjudging from the trustee. The recording of a back-bond of trust would seem not to have the effect of reinstating the grantor in his radical right (a). Where property is left to trustees without explicit directions as to its disposal, the Court will, if such appear to be the intention, direct it to be conveyed to the heirs named in another part of the settlement (b); or to the heir or residuary legatee named in any former settlement, which is only revoked "in so far as inconsistent" with the later deed (c); or to the testator's heirs-at-law (d).

SECTION II.

OF CONFIRMATION AS EXECUTOR.

Completion
of Title to
Personal Prop-
erty under
Trust *inter
vivos*.

In the case of trusts *inter vivos*, nothing more is requisite to the completion of the trustee's title to the personal property of the trustor than the delivery of possession, followed, in the case of incorporeal rights, by intimation to the debtor. In the case of testamentary trusts, confirmation as executor is necessary to give the trustee an active title.

Nature of the
Office of Exe-
cutor.

The nomination of an executor is a common but not an indispensable part of a will; and though it is omitted, the trustee may be deemed executor-dative in his character of universal donee, after which he is in a position to obtain confirmation. By the ancient law of Scotland, the appointment of an executor was equivalent to a universal legacy in favour of the person so appointed; other legacies being regarded as burdens upon the executor's residuary

(a) See opinions in *Gardyne v. Royal Bank*, 13 D. 918, which are not affected by the reversal, 1 M'Q. 358. This subject is more fully considered in Part Third, Chapter XXXIII.

(b) *Ramsay v. Anderson*, 26 Feb. 1836, 14 S. 570.

(c) *Allan v. Glasgow's Trs.*, 28 Jan. 1842, 4 D. 494; *Black's Trs. v. Millar*, 23 Feb. 1836, 14 S. 555, affd. 14 July 1837, 2 S. & M'L. 866.

(d) See Chapter X. Section 1 (Resulting Trusts).

interest. But by the statute 1617, cap. 14, the office of executor was in substance declared to be a trust for the benefit of the widow, children, and nearest of kin of the testator, according to the division observed by the common law, reserving to the executors a third of the dead's part after deduction of debts and legacies; a reservation which has since been repealed by the Act 18 Vict. cap. 23, § 8. The appointment of an executor is therefore equivalent to a trust conveyance of the entire moveable estate, including not only the dead's part, but also the legitim and *jus relictæ* where such are due, together with a grant of such powers of administration as belong to the office of executor at common law (*a*). In this capacity he takes the estate for the benefit of the testator's legatees, if any; or otherwise, for the benefit of the widow, children and next of kin, as provided by the statute of 1617.

Prior to the Act 4 Geo. IV. cap. 98, confirmation was not only requisite to clothe the executor with the title of administration, but was also necessary (unless where the estate had been reduced into possession) to vest the beneficial interest in the next of kin, or even, as some have held, in the legatees under a testament (*b*). But, however this may have been, the law is now fixed by the 1st section of 4 Geo. IV. cap. 98, which enacts, that from and after 19 July 1823, "in all cases of intestate succession, where any person or persons who at the period of the death of the intestate, being next of kin, shall die before confirmation be expedite, the right of such next of kin shall transmit to his or her representatives, so that confirmation may and shall be granted to such representatives in the same manner as confirmation might have been granted to such next of kin immediately upon the death of such intestate."

The Beneficial Interest vests without Confirmation.

Prior to the Reformation, the administration of the moveable estates of deceased persons was regulated by the canon law, and the jurisdiction in such questions was exercised by the Bishops' Court. That tribunal was, in the time of Queen Mary, supplanted

Jurisdiction of the Commissary Courts in Scotland.

(*a*) See this explained by the Lord J.-C. Inglis in *White v. Finlay*, 15 Nov. 1861, 24 D. 47.

(*b*) See Bell's Com. 657. We understand that in the recent case of *Nicol v. Cooper's Trs.*, 14 Feb. 1862, 34 Jur. 259, some doubts were expressed in the First Division, as to whether a

beneficial interest could be held to have vested in the legatees so as to be capable of transmission to their representatives without service. The general proposition, that the beneficial interest vests by the operation of the trust conveyance, is, we should think, unquestionable.

Executor
bound to give
up an Inven-
tory of the
Estate.

by a Commissary Court, having its principal jurisdiction in Edinburgh, with provincial Commissaries in the different counties. By 4 Geo. IV. c. 97, the provincial Commissaries were superseded, and their functions devolved upon the Sheriffs of the counties; and by two statutes of the last reign, the metropolitan court has been put upon the same footing, and the universal jurisdiction of the Commissary of Edinburgh has been transferred to the Sheriff of that county (*a*). In order to entitle the executor-nominate, or executor-dative *qua* universal donee to obtain confirmation, it is necessary that he should present to the Commissary an inventory of the whole executry estate. This requisite, after having fallen into disuse, was re-enacted by the statutes imposing the legacy and inventory duties; and by 4 Geo. IV. c. 98, § 3, it is expressly enacted, that the person applying for confirmation shall confirm the whole moveable estate known to him at the time (*b*); and provision is made by the 40th section of the 48 Geo. III. c. 149, as amended by 16 & 17 Vict. c. 59, § 8, for supplementing the statement by an additional inventory, which must specify the amount of the whole succession, including the sums which may have been omitted by accident or error in the previous statement. By a recent Act, money secured on heritable property, as well as money secured by bonds in favour of heirs and assignees, excluding executors, must be scheduled in the inventory, and are chargeable with stamp duty in respect of such inventory, or probate or letters of administration (*c*). It is settled in practice that funds invested in the name of the deceased *in trust*, do not fall to be included in the inventory of his estate.

Probate and
Letters of Ad-
ministration.

In England the executor's title of administration and possession is established by proceedings in the Court of Probate analogous to the process of confirmation. Letters of administration, with the will annexed, are granted to persons having a title of administration under the will. The obtaining of probate or administration appears to be necessary to vest the executor with an active title; but probate was never considered in England, as confirmation was at one time with us, to be a condition of the vesting of the beneficial interest.

(*a*) 1 Wil. IV. c. 69; 6 & 7 Wil. IV. 48 Geo. III. c. 149, § 38; 1 Wil. IV. c. 41. c. 69.

(*b*) See also 44 Geo. III. c. 98, § 23; (*c*) 23 Vict. c. 15, § 6.

The law being thus substantially the same in both parts of the kingdom, as far as regards the title of administration, it was thought unnecessary that executors should be put to the expense of completing a title in both forms; and accordingly, one main object of the Act 21 & 22 Vict. c. 56 was, to enable executors, who had obtained a title of administration in any part of the United Kingdom, to dispense with the necessity of obtaining probate, or confirmation, as the case might be, elsewhere. As this is now the regulating enactment in relation to executry titles in Scotland, it may not be out of place to introduce a summary of its provisions.

Confirmation
and Probate
Act, 1858.

§ 1 abolishes the old form of raising edicts of executry for the purpose of obtaining the raiser decerned executor; and by § 2 it is provided, that every person desirous of being decerned executor shall, instead of applying, as heretofore, for an edict of executry from the Commissary, present a petition to the Commissary for the appointment of an executor, which shall be subscribed by the petitioner, or by his agent; and which (§ 3) shall be presented to the Commissary of the county wherein the deceased died domiciled, or if he died domiciled furth of Scotland, or without any fixed or known domicile, having personal or moveable property in Scotland, to the Commissary of Edinburgh. By § 4 every such petition shall be intimated by the Commissary Clerk affixing on the door of the Commissary Court-house, or in some conspicuous place of the Court, and of the office of the Commissary Clerk, in such manner as the Commissary may direct, a full copy of the petition; and by the Keeper of the Record of Edictal Citations at Edinburgh inserting in a book, to be kept by him for the purpose, the names and designations of the petitioner and of the deceased, the place and date of his death, and the character in which the petitioner seeks to be decerned executor; which particulars the Keeper of the Record of Edictal Citations shall cause to be printed and published weekly, along with the abstracts of the petitions for general and special services.

Procedure by
Petition in the
Commissary
Court.

By § 6 it is provided, that "on the expiration of nine days after the Commissary Clerk shall have certified the intimation and publication of a petition for the appointment of an executor as aforesaid, the same may be called in Court, and an executor decerned, or other procedure may take place, according to the forms now in use in

Decerniture
and Confirmation
upon such
Petitions, etc

case of edicts of executry, and with the like force and effect, and decree dative may be extracted on the expiration of three lawful days after it has been pronounced, but not sooner ; provided always, that nothing herein contained shall alter or affect the law as to executors finding caution ; and that bonds of caution for executors may be partly printed and partly written." § 7 provides, "That nothing hereinbefore contained shall alter or affect the course of procedure now in use before the Commissaries in confirmations of executors-nominate." By § 8, inventories of personal estates and relative testamentary writings may be given up and recorded in, and confirmations may be granted and issued by, any Commissary Court to which it is competent to apply in virtue of the provisions of the Act, for the appointment of an executor-dative to the deceased.

Confirmation to include the deceased's Personal Estate in England and Ireland.

The statute deals, in the next place, with the effect to be given to probate and confirmation by the Courts of other parts of the kingdom. By § 9 it is provided, that "it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in *Scotland*, any personal estate or effects of the deceased situated in *England* or in *Ireland*, or both ; provided that the person applying for confirmation shall satisfy the Commissary, and that the Commissary shall, by his interlocutor, find that the deceased died domiciled in *Scotland*, which interlocutor shall be conclusive evidence of the fact of domicile ; Provided also, that the value of such personal estate and effects, situated in *England* or *Ireland* respectively, shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom.

Confirmation, when sealed with the Seal of the Court of Probate in England, to have the effect of Probate.

§ 12 provides, that "when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in *Scotland*, which includes, besides the personal estate situated in *Scotland*, also personal estate situated in *England*, shall be produced in the principal Court of Probate in *England*, and a copy thereof deposited with the Registrar, together with a certified copy of the interlocutor of the Commissary finding that such deceased person died domiciled in *Scotland*, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in *England* as if a probate

or letters of administration, as the case may be, had been granted by the said Court of Probate" (a).

The same provision is by § 13 extended to confirmation to the estate of a person who has died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in Ireland, on such confirmation being produced in the Court of Probate in Dublin.

Idem, as to Ireland.

By § 14 it is provided, that when any probate or letters of administration, to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein—or by any note or memorandum written thereon, signed by the proper officer—stated to have died domiciled in England; or by the Court of Probate in Ireland to the executor or administrator of a person who shall in like manner be stated to have died domiciled in Ireland, shall be produced in the Commissary Court of the county of Edinburgh, and a copy thereof deposited with the Commissary Clerk of the said Court; the Commissary Clerk shall endorse or write on the back or face of such grant a certificate in the form prescribed in the schedule annexed to the Act, and such probate or letters of administration, being duly stamped, shall be of the like force and effect, and have the same operation in Scotland as if a confirmation had been granted by the said Court.

Probate, when endorsed by the Commissary Clerk, to be equivalent to Confirmation.

By § 15 it is provided, that where the deceased shall be stated in the probate or letters of administration to have been domiciled in England or in Ireland, as the case may be, such probate or letters shall, for the purpose of securing payment of the full stamp duties, be considered to be granted for the whole of the personal and moveable estate of the deceased in the United Kingdom, within the meaning of the Act 55 George III. c. 184, and of all other Acts relating to stamp duties on probates and letters of administration in England and Ireland respectively; the affidavit required by law to be made on applying for probate or letters of administration in England or Ireland as to the value of the estate and effects of the deceased—and where the Commissary shall find that the deceased

Provision as to Inventory and Stamp Duties.

(a) In *Hawarden v. Dunlop*, 31 L. J., Pr. & M. 17, Sir C. Creswell doubted whether, under this clause, the interlocutor of the Commissary was conclusive on the question of domicile. The object of the statute was, he thought, to render an application for probate unnecessary, but not to exclude the parties from a hearing in Court if desired.

Effect of
Affidavit as to
Domicile.

was domiciled in Scotland, the inventory to be exhibited and recorded in the proper Commissary Court in Scotland before obtaining confirmation, or intromitting with or entering upon the possession and management of the estate in Scotland—shall respectively extend to and include the whole of the personal and moveable estate of the deceased in the United Kingdom, and the value thereof; and the stamp duties for the time being chargeable on probates and letters of administration, and on inventories, respectively, shall be chargeable upon any probate or letters of administration to be granted, and any inventory to be exhibited and recorded as aforesaid respectively, for the whole of the personal and moveable estate of the deceased in the United Kingdom, and the value thereof; and the said affidavit shall also separately specify the value of the said estate and effects in Scotland. And § 17 provides, that in any case where, on applying for probate or letters of administration, it shall be required to be stated that the deceased was domiciled in England or in Ireland, the affidavit shall specify the fact according to the deponent's belief, which shall be sufficient to authorize the same to be so stated in the probate or letters of administration: By this section it is provided also, that any such statement, and the interlocutor of the Commissary finding that the deceased was domiciled in Scotland, shall be evidence and have effect for the purposes of the Act only.

Translation
of Foreign
Wills.

The form of confirmation is regulated by § 10 and relative schedule, according to which the testamentary instrument is referred to as recorded in the books of the Commissary Courts. With respect to confirmations of foreign wills, the practice in the Commissary Court of Edinburgh is to receive and record an official copy, if it has been proved in the country from which it comes. If it has not been already proved, the original will must be produced. In either case, the will, if expressed in a foreign language, must be accompanied with a translation; and in doubtful cases the Commissary Clerk is authorized to call for an opinion by a barrister of the foreign country, certifying that the will is valid and executed in conformity with the laws of that country (a).

(a) In England the practice appears to be to grant probate of a translation of the will alone; a practice which seems open to serious exception. In *Wylie v. Enohin*, 29 L. J. Ch. 341, it was doubted whether the Court had

We refer to the chapter in the third part of this treatise for a discussion of the question, How a title to lapsed succession may be completed in the person of the beneficiary.

SECTION III.

COMPLETION OF THE TRUSTEE'S TITLE BY INFESTMENT.

In order that a trust conveyance of heritable property may be rendered effectual, the estate must be vested either in all the trustees, or in some one, to be held subject to the acts and directions of the others (*a*).

As regards trusts of heritage, the title of the trustee may be said to be complete when he has taken infestment by registration of the trust conveyance or other document of heritable title. If the lands have been specially conveyed, nothing more is requisite than the registration of the trust deed, or of such parts of it, including the description of the lands, as may be specified in a clause of direction, under the provisions of the Titles to Lands Acts 1858 and 1860 (*b*). If the deed contain no clause of direction, and it is desired to prevent the trust purposes entering the record, a notarial instrument may be executed and registered in terms of the immediately preceding sections. In completing a title to lands acquired by a general trust conveyance, recourse may be had either to the old form of adjudication in implement (*c*), or, whether the settlor held under a feudal (*d*) or a personal title (*e*), to a notarial instrument under sections 12 and 14 of the Titles to Lands Act 1858, setting forth the conveyances to the different subjects, and the series

Completion of
Trustee's Title
under Titles to
Lands Act.

power to question the accuracy of the translation, as the original had not been proved. However, the Lords Justices put some questions to witnesses acquainted with the language of the will, and *being satisfied* that the translation was accurate, it became unnecessary to consider the question of competency. (See pp. 343-4.)

(*a*) Bell's Pr. § 1994; Com. 5th Ed. I. 34.

(*b*) 21 & 22 Vict. cap. 76, § 3; 23 & 24 Vict. cap. 143, § 5.

(*c*) The conclusions for constitution and adjudication may be combined in one summons, whether the heir renounce or not. See 21 & 22 Vict. c. 76, § 27; 23 & 24 Vict. c. 143, § 16;

(*d*) See § 12, Act of 1858, as to notarial instruments upon general conveyances of lands in which the granter was infest, and § 8, Act of 1860.

(*e*) 21 & 22 Vict. cap. 76, § 14; 23 & 24 Vict. cap. 143, § 10.

of titles, including the general disposition, by which the trustee acquired right to the property. Security titles will be completed either under the Acts of 1858 and 1860, or under the corresponding provisions of the Acts 8 & 9 Vict. c. 31 (a), and 10 & 11 Vict. c. 50 (b). If the trust is an express condition of the conveyance, the property is secure against the diligence of the trustee's creditors, whether the conveyance is recorded or not.

Effect of the
Completion of
the Trustee's
Title.

But where the declaration of trust is embodied in a separate unrecorded back-bond, such declaration is an effectual qualification of the trustee's title, only so long as the title continues personal. If therefore it is intended that the trustee's right should be made real by recording the conveyance in his favour, the declaration or back-bond should also be recorded in the Register of "Sasines and Reversions;" otherwise the beneficiary will have no security over the estate (c).

Completion of
Title where
the Trustee's
Title is *ex facie*
absolute.

Where property is vested by *ex facie* absolute disposition in a trustee for behoof of the settlor's creditors, it is a question of expediency whether the trustee should be required to complete a title in his person. In the prospect of the estate turning out insolvent, it would be desirable that the trustee should take infeftment for the purpose of preventing the acquisition of preferences by adjudgers. But in the case of a private trust for sale by a solvent proprietor, the completion of a title by infeftment is to be avoided, especially if the trust is likely to continue for some time. Infeftment on an *ex facie* absolute disposition puts the property within the power of the trustee's personal creditors; and this risk, which attaches of necessity to all recorded conveyances, is obviated by leaving the trustee's title to the lands personal upon the trust-disposition (d).

(a) See §§ 4, 5, & 6.

(b) See § 10.

(c) Stat. 1459, cap. 27; 1617, cap. 16; *Keith v. Maxwell*, 1795, Bell's Fol. Ca. 234.

(d) "Where," says Bell, "the conveyance of the estate is expressly a *Disposition in Trust*, for certain uses and purposes, and the precept and procuratory are so conceived, the completion of the title in the person of the trustee by sasine, recorded with its

condition, while it vests the fee in him, leaves to the person for whose behoof it is intended an effectual and secure estate, or *jus crediti* as a real burden on the trust estate. The consequences of this are important: 1. The creditors of the trustee have no right to attach the trust estate for the trustee's debts. The estate in him is, in its nature and origin, a limited and qualified estate; it is, in regard to his own creditors, a mere formal right,—

The completion of titles by trustees upon sequestrated estates and liquidators of joint stock companies is now regulated by the 22d and 15th sections of the Acts of 1858 and 1860 respectively, and, in the case of judicial factors, etc., by the 38th section of the Act of 1860.

Trustees in
Bankruptcy or
Liquidators.

By the 13 & 14 Vict. cap. 13, as extended by 23 & 24 Vict. cap. 143, § 32 (a), provision has been made for vesting heritable property in trustees for the maintenance, support, or endowment of ministers of religion, missionaries, or schoolmasters, or for the maintenance of the fabric of churches, chapels, meeting-houses, or other places of worship, or of manses or dwelling-houses, or offices, for ministers of the Gospel, or of school-houses or schoolmasters' houses, or other like buildings, in such a form as to confer upon the trustees the right of perpetual succession, and to obviate the necessity of renewing the investiture when the trust devolves upon successors. These provisions are applicable to feu-duties, heritable securities and other heritable property, as well as to lands and houses (b). §§ 1 and 3 of the Act of 13 & 14 Victoria provide for the vesting of the estate in the trust disponees and their successors; and by § 2 it is enacted, that unless a special agreement shall have been made with the superior for a periodical payment in lieu of composition, it shall be lawful for the superior, at the death of the existing vassal, and at the expiration of every period of twenty-five years thereafter during the continuance of the trust, to demand from the disponees a sum corresponding to the casualty or composition, which would have been payable upon the entry of a singular successor.

Completion of
Titles to Prop-
erty of
Trustees for
Churches and
Schools.

Trust disponees are liable in payment of composition as singular successors if they enter; although the trust is for the benefit

Entry and
Composition.

a deposit for the benefit of others; and the estate in all its forms, and the proceeds of it, if sold while they can be identified (as bills or bonds of the purchaser, lands exchanged or exchanged for the original trust estate, etc.), belong exclusively to those having right under the trust, and can neither be attached nor divided by the trustee's creditors. 2. The maxim of law, that a fee cannot be in pende, is satisfied by the vesting of the estate

in the trustee; so that for persons yet unborn, or otherwise incapable of holding the fee, an effectual contingent right may be constituted in the meanwhile, which in due time may be completely available."—Com. 5th Ed. I. 34; and see Pr. § 1994.

(a) Provisions of a similar nature have been introduced into the Friendly Societies Consolidation Act, 18 & 19 Vict. cap. 63, §§ 11 and 17.

(b) 23 & 24 Vict. cap. 143, § 32.

of the heir (a). But if the heir is willing to enter for the purpose of saving the trustees a year's rent, the superior must receive him (b). This rule holds of course *a fortiori*, if the superior has called the heir as a co-defender with the trustees in a declarator of non-entry (c), which, it would seem, the superior is bound to do if required by the trustees (d).

Completion of
Title where
Property
vested in Cor-
poration.

Where property is vested in a corporation for charitable purposes, the title may be taken in name of the corporation, subject to such periodical payment in name of composition as may be agreed upon; or, if parties do not agree, to a trustee or trustees for behoof of the corporation; in which case the renewal of the investiture will be in accordance with the ordinary rules of feudal conveyancing (e).

Singularities
in the Title of
Trustees.

We proceed to inquire how far the ordinary modes of completing a title are susceptible of adaptation to singularities in the title of trustees, connected with the form of their appointment. In all such cases the object of the Court is of course to give effect to the appointment, notwithstanding the omission of words of express conveyance in the deed of settlement; and to avoid the expense of adjudication, the rule has been laid down, that a supplementary appointment shall receive effect in the same manner as if the names of the trustees had been inserted in the original conveyance. The rule, however, is understood in practice to be restricted to the case of settlements executed *intuitu mortis*, as there is nothing in the authorities to warrant its extension to trusts which are intended to take effect during the lifetime of the truster. In the note to his interlocutor in the case of *Mackilligin* (f), quoted below, Lord Curriehill observes, that the execution of an instrument containing a formal dispositive clause, while it does not impair the truster's rights of ownership, "in effect enables him thereafter to test upon his heritable property in any way he may think proper, by giving

Case of Trustee created by Deed of Nomination.

(a) *Grindlay v. Hill*, 18 Jan. 1810, F. C.

(b) *Piggott v. Colvill*, 9 Dec. 1829, 8 S. 213.

(c) *Hill v. Mackay*, 5 Feb. 1824, 2 S. 681.

(d) *Mag. of Hamilton v. Hart's Trs.*, 2 Feb. 1854, 16 D. 437.

(e) See *Hill v. Merchant Co. of Edin.*, 17 Jan. 1815, F. C.; *University of Glasgow v. Hamilton*, 1713, M. 9296, and 15075, as reversed on appeal; overruling *Church, etc., of Aberdeen v. King's College*, 1712, M. 15034.

(f) *Mackilligin & Ors. v. Mackilligin*, 23 Nov. 1855, 18 D. 88.

directions to his trustees (if the settlement be a trust), or by making such additions to, or alterations or revocations of, his donations as he may think proper, at any future period during his lifetime" (a). If the trust estate consist of moveable property, a mere nomination as executor and universal intromitter with the estate will vest the right to the property in the trustee, so as to entitle him to obtain confirmation, which in this case serves to supply the want of a conveyance in his favour. And on the same principle, the appointment of a party as trustee for the distribution of heritable property previously disposed, will receive effect as a conveyance; the law supplying a fee in the person nominated as trustee, wherever a beneficial interest has been created by trust-disposition.

Until the decision in *Mackilligin's case* (b), it had been thought in practice that an adjudication was necessary, or a conveyance from the trustees first appointed; and it had even been maintained that the nomination of new trustees was an absolute nullity as regards the right to heritage, unless accompanied by words importing a conveyance in their favour. This last proposition, however, was evidently untenable; for it had been already ruled, by a unanimous judgment in *Robertson v. Ogilvie's Trustees* (c), that a trustee was validly nominated although not named in the dispositive clause of the settlement; a decision which has been confirmed in two later cases (d). In *Mackilligin's case*, the terms of the destination to trustees were altered by two codicils, of which the first revoked the appointment of three of the original trustees, and appointed a new trustee to act along with those remaining. The second codicil not only renewed the destination under the former codicil, but revoked all prior nominations, so that none of the trustees could claim to take the estate in virtue of the original disposition. In these circumstances, it was held by Lord Justice-Clerk Hope and Lord Wood, that although the nomination of trustees in the original deed had fallen by the effect of the revocation, yet the dispositive clause operated as an effectual conveyance to all parties who might be afterwards nominated to the office; the names of the trustees sub-

*Mackilligin v.
Mackilligin.*

(a) 18 D. 87.

(b) See the arguments in *Mackilligin's case*, *supra*.

(c) *Robertson v. Ogilvie's Trs.*, 20 Dec. 1844, 7 D. 236.

(d) *Mackilligin, supra*; *Adv.-Gen. v. Royal Infirmary*, 23 D. 1213.

sequently appointed being held to be imported into the original deed, upon which they were accordingly entitled to take infeftment directly. The Lord Justice-Clerk observed that a conveyance, although blank in the names of the trustees, might be sustained, if the names were afterwards supplied by a codicil. Lord Cowan, on the other hand, held that any such appointment could only receive effect as an obligation to convey, transmitting against the heir of the truster. The more correct view appears to be, that the codicil will vest the property in favour of the new trustees if the original disposition is in favour of trustees specifically named, and *of such as may be thereafter named*, on the same principle as an entail may be constituted in the form of a blank procuratory with a relative deed of nomination. But it is against principle to hold that a disposition *solely* to trustees named, should operate as a conveyance to those named in a subsequent codicil; and in practice we should think a conveyance from the original trustees or from the heir-at-law a necessary step in the title.

Effect of error
in the designa-
tion of Trus-
tees.

Mistakes or defects of specification in the designation of the trustees will not prevent the estate from vesting, unless where the intention is totally obscured. For example, a bequest of a sum of money, to be laid out in lands for the maintenance of a school, "to be under the management of the magistrates and ministers of the Established Church," has been held to import a conveyance in trust to the magistrates and ministers of Glasgow, the town in which the testator had resided (*a*); and the expression, "Moderator of the city of Aberdeen," in a bequest for charitable purposes, was construed so as to confer the trusteeship upon the Moderator of the Synod of Aberdeen (*b*). In a recent case, where the designation of the trustees was redundant, a legacy to "the Scottish Missionary Society of the Established Church" was given to "the Scottish Missionary Society"—a society to which the testatrix had contributed in her lifetime; and a claim for the Home Mission Committee of the Established Church was rejected (*c*). Where a legacy was left to the poor of the town of Dunblane, to be divided by "the resident

(*a*) *Murdoch v. Magistrates & Ministers of Glasgow*, 30 Nov. 1827, 6 S. 186.

(*b*) *Synod of Aberdeen v. Milne's Trs.*, 25 Feb. 1847, 9 D. 745.

(*c*) *Scottish Missy. Socy. v. Home Miss. Com.*, 19 Feb. 1858, 20 D. 634. See the legacy cases, *supra*, p. 155.

minister of the Presbyterian Church, and the two highest civil officers of the town" of Dunblane, a claim for the legacy, at the instance of the minister of the Church of Scotland, the Sheriff-Substitute and the Sheriff-Clerk Depute, resident in the town, was entertained (a). It is scarcely necessary to add, that a designation of trustees is perfectly good, although no individuals are named, where the trust is conferred on persons holding a specified office. In *Pet. Wylie* (b) it was assumed that there had been a valid appointment of trustees for the management of a charitable fund, one of their number being described in the settlement as "the proprietor of the lands of Nellfield for the time being." The proprietor, as it happened, being a minor, the Court refused to allow the other trustees to act without him, and appointed a judicial factor.

Conveyance to Trustees under a *designatio personarum*.

A difficulty is sometimes experienced in practice with respect to the mode of making up a title in the persons of trustees who are designated by descriptive reference. Sometimes, as in the cases of *Wylie*, and *Boe v. Anderson*, above referred to, there is a general disposition to trustees *nominatim*, upon trust to convey certain subjects, or to pay over a certain sum, to persons designated descriptively, as trustees in perpetuity. In such a simple case, the investiture will of course be completed by the testamentary trustees conveying to the parties answering to the description, and to their successors, etc. (as in the original destination), upon the narrative that the disponees named and designed are the persons for the time being holding the office or position in question. But where there is a direct conveyance to trustees designed but not mentioned *nominatim*, it may be doubted whether the trustees could take infestment on the disposition without having constituted their right by declarator, or having obtained a warrant for infestment in their own names, in an action of declaratory adjudication. In such cases, trustees will naturally be desirous of obtaining the security of a decree in their favour; and it is right perhaps that they should have it. We do not think, however, that any well-founded objection would lie to a title by infestment on the trust disposition. The trustees, in the case supposed, are properly conditional institutes, the condition being that the person is magistrate (or whatever the office may be)

Completion of Title where Trustees are designated but not named.

(a) *Boe v. Anderson*, 11 Nov. 1857, 20 D. 11. (b) *Pet. Wylie*, 28 June 1850, 12 D. 1110. Sequel, 7 Mar. 1852.

for the time being. Under the old system of conveyances, a notary was entitled to give sasine to a conditional institute, on being satisfied by reasonable evidence of the failure of the disponees named in the first instance (a). By parity of reasoning, we infer that a trustee nominated descriptively would be entitled to endorse a warrant for registration in his own favour upon the conveyance, which we think would suffice, when executed, to vest the estate in his person.

Completion of
Title by the
Heir of the
last surviving
Trustee.

To complete the subject of the vesting of the legal estate in the trustee, we may now direct attention to the case arising upon a lapsed trust, with a destination to the heirs of the last surviving trustee. In this case the heir of the surviving trustee is held, as regards both heritable and moveable property, to mean the heir-at-law, who must be called in any action of adjudication at the instance of the beneficiaries, or of a judicial factor (b). It would seem that in England a surviving trustee may devise his trust estates by will; but no such practice has ever been recognised in Scotland; nor would it be attended with any obvious advantage, because the powers of a trustee who succeeds merely in the character of heir to a surviving trustee, are necessarily very circumscribed. The heir to a trust may indeed make up titles to the estate, and convey it to a factor, or to the beneficiaries, if the purposes of the trust are exhausted. Professor Menzies adds, that he may "execute the trust" (c). But it is at least extremely doubtful whether a trustee by succession can execute discretionary powers; and there can be no doubt of the right of the beneficiaries to have the heir superseded by the appointment of a judicial factor, in the event of his proposing to execute a continuing trust. Professor Menzies distinguishes between the case where heirs are called by the destination and where they are omitted, as it is only in the event of the heir being called that he is said to be entitled to execute the trust. We rather think that in practice the distinction between the two cases is understood to be very slender. If the heir is called by the destination, he may, as already explained, make up a title by service as heir of provision, for the purpose of conveying the estate to others; while an heir not

(a) *Fogo v. Fogo*, 25 Feb. 1840, 2 D. 651. *v. Mackenzie*, 1758, M. 16206; *D. of Hamilton's Cr. v. E. of Selkirk*, 1740,

(b) *Parker*, Adj. 86; *Dalziel v. Elch. Tr. No. 9.*

Dalziel, 1756, M. 16204; *Drummond* (c) *Menzies' Lect.*, p. 690.

called is understood to have no title to interfere, and is merely called *pro forma* as defender in the process of declaratory adjudication.

The view here taken of the position of a trustee by succession, is supported by the opinion of Lord Justice-Clerk Hope in *Gordon's Trs. v. Eglinton* (a). The trustees in this case had made up a title by disposition from the truster's eldest son, whereby the estate was conveyed to the "trustees under the trust disposition before specified, and their heirs and assignees whomsoever." The Lord Justice-Clerk observed, "It is true that under this disposition, by which it was intended entirely to divest the eldest son and his heirs, the title to the lands would be carried on after the death of the trustees into the persons of their heirs, so as to prevent the right reverting to the eldest son, or to support the acts of any person who might be appointed to act, if all the three had died. But the heirs would not have been trustees in any other sense than that their title would have been burdened with the obligation to hold for the purposes of the trust, and to denude when duly called upon. The powers of the office of trustee would not have passed by the law of Scotland" (b). With this opinion it may be useful to compare the case of *M'Leish's Trs. v. M'Leish* (c), in which a destination to assignees was held to confer a power of continuing the trust by assuming new trustees.

Heir succeeds to the Estate, but not to the office of the Trustee.

In *Gordon's* case, just cited, the judges of the Second Division were all of opinion that a destination to trustees and *their* heirs meant that the heir of the last survivor should succeed alone, the title of predeceasing trustees being held to have lapsed altogether, in accordance with the doctrine of survivorship. But where the intention of the settlor is to create a permanent trust, it would appear that a general destination to "trustees, their heirs and assignees," carries the estate, not to the heirs of the last survivor, but to the heirs-at-law of all the trustees. In the case of *Ferguson v. Marjoribanks* (d), the settlor conveyed his estate to trustees, their heirs and assigns, for the purpose, *inter alia*, of founding and maintaining a grammar school. All the trustees having died, it was maintained

Effect of Destination to Trustees, "their Heirs and Assignees."

(a) *Gordon's Trs. v. Eglinton*, 17 July 1851, 13 D. 1381.

(b) 13 D. 1385.

(c) *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 914.

(d) *Ferguson v. Marjoribanks*, 1 April 1853, 15 D. 637.

that the succession had vested by the law of England in the defender, as heir of the last surviving trustee ; and the Court was invited to make a new nomination, on the ground that this gentleman was disqualified by bankruptcy. Lord Rutherford, before whom the case came, in the first instance, seems to have assumed that the law of Scotland would carry the trust, under the given destination, to the heirs of *all* the trustees ; and his only difficulty was in deciding whether the decision must be governed by the law of England or that of Scotland. The Lord President (a), while adhering to the Lord Ordinary's decision as being in accordance with the expressed intention of the testator, that there should be more than one continuing trustee, would not say that the law of Scotland differed from that of England as to the construction of a general destination to trustees and their heirs. Distinguishing between those duties of the trustees which are properly *executory*, and those which relate to the permanent management of the school, he remarked, "Assuming, as to the first part of the trust, that the party who is to receive and invest this fund in the event of the failure of the persons named, would be the heir of *the last survivor* of them, that does not necessarily solve the question, who are the parties to have the government of the school afterwards ?" Looking to the peculiar circumstances of this trust, we do not think that the decision can be regarded as overruling that of *Gordon v. Eglinton* in the case of ordinary family trusts. It certainly would lead to most anomalous consequences, if the mere use of the general expression "their heirs" were to be held to entitle the heir of each deceasing trustee to take his place in the trust along with the surviving original trustees, or even to join in the ultimate conveyance to the beneficiaries.

The mode of completing a title to lapsed succession in the person of the beneficiary, is noticed in a subsequent chapter, on the Right of the Beneficiary to a Specific Conveyance of the Estate.

(a) Lord Colonsay, 15 D. 642.

CHAPTER XVI.

OF THE DUTIES OF TRUSTEES OF SETTLEMENTS
OF PERSONAL OR GENERAL ESTATE.

HAVING dealt with the title of the trustee in its various aspects, we proceed to inquire into the duties which the trustee may be required to perform. The subject is an extensive one, and can only be satisfactorily treated by taking up the various species of trust consecutively. As, however, there are certain duties which enter into the performance of all, or nearly all the trusts with which we are acquainted, it is proper that these should occupy the initial division of our classification. The duties to which we refer are : (1.) The realization of the estate, with a view to investment or distribution : next, the management of such portions of the estate as it may be necessary to retain specifically. These, for convenience, may be classed in one section. (2.) The duty of safe custody. (3.) The duty of paying the trustor's debts. Under this head we shall consider the question, Out of what funds, heritable or moveable, the debts fall to be paid. (4.) The duty of investment, with especial reference to the question, What is a legal investment of trust money ?

SECTION I.

OF THE REALIZATION AND MANAGEMENT OF THE ESTATE.

When we speak of *realization*, personal estate alone is understood to be in view. The sale of heritable estate is a special trust, and will be separately considered (a). Before the trustee can proceed to realize, he must qualify a title ; and in the case of testa-

(a) See Chapter XVII., *infra*.

mentary settlements, the most usual title of intromission is that of confirmation as executor.

Trustees must confirm in order to have an active Title.

The trustee's right to confirmation is constituted by acceptance of the trusteeship, which, in the general case, carries with it the duties and responsibilities of executry. Having once declared his acceptance of the office, the executor ought to lose no time in having his right confirmed; because, without the title conferred by confirmation, he is neither in a position to insist for the recovery of debts due to the estate, nor to accept a discharge for its liabilities (a). For example, it has been held that an executor or administrator suing for recovery of a trust debt must produce his title, upon demand; the refusal to make production being a ground for a sist of process (b). The question of the sufficiency of the inventory given up on confirmation, is not one with which the debtor is concerned; the extract decree of confirmation being a sufficient title to sue for all debts included in the inventory (c). Should the amount ultimately realized exceed the estimated value of the debt as per inventory, it will be the duty of the trustee to give up an additional inventory, paying stamp duty on the difference.

What Titles of Possession are equivalent to Confirmation?

By the statute 1690, cap. 26, special assignations and dispositions in favour of representatives are declared to constitute a good and valid title of possession, "albeit the sums of money or goods therein contained be not confirmed." On the construction of this statute it has been held, that a conveyance in general terms of a share of the capital stock in the business of a firm (d), as also a bequest of all debts and sums of money due to the testator by one individual (e), were special assignations. If, therefore, the executor can obtain possession of debts specially conveyed without resorting to diligence, his title is secure without confirmation (f); but he would not be safe, in the prospect of a litigation, to trust to the security of the assignation; because the Act saves the diligence of creditors, and consequently, as Lord Glenlee observed, if diligence were done before possession

(a) See 21 & 22 Vict. cap. 56, as to Confirmation of Exrs., and grants of Probate and Administration.

(b) *Horne & Rose v. Ram*, 23 Nov. 1848, 11 D. 141.

(c) *Broun v. Moffat*, 16 Dec. 1853, 16 D. 225.

(d) *Bell v. Willison*, 13 Jan. 1831, 9 S. 266.

(e) *Lyle v. Falconer*, 2 Dec. 1842, 5 D. 236.

(f) *Dobie v. Oliphant*, 1707, M. 14390.

or intimation, the subject would be carried to the creditor (a). The execution of a bond of corroboration in favour of the executor (b), the payment of interest (c), or acceptance of an intimation of assignation (d), have been considered effectual, on the principle of constructive delivery, to vest the property in the executor; but it may be doubted whether constructive possession would be sufficient to exclude the interest of creditors using diligence in funds not the subject of a special assignation.

Prior to the passing of the Confirmation and Probate Act, 1858, it was settled that probate or letters of administration were equivalent to a license to sue in the Scotch Courts; the debtor, however, being entitled to insist on confirmation before extract (e). Under the present law (f), an executor founding on an English title would only require to obtain an indorsation of the probate or letters of administration from the Commissary Court of Scotland. In like manner, the title of a Scotch trustee suing in England or Ireland must be perfected by registration of the extract of confirmation in the Court of Probate (g).

Probate and
Letters of Ad-
ministration.

In the discharge of his duty to the truster, it may be necessary for an executor not only to resist proceedings for the reduction of the conveyance in his favour, but also to take action against vitious intromitters, and parties claiming possession of the estate in virtue of competing titles (h); and in the event of a competition as to the possession of a fund situated in Scotland, the question of possessory title will be determined by the *lex loci rei sitæ* (i). Executors claiming right to a personal bond as part of the moveable estate of the deceased, have been found entitled to reduce a bond of corroboration—which had been granted by inadvertence to the heir-at-law,—after a lapse of nearly forty years from the date of the bond of

Reduction of
Competing
Titles, Ac-
counting, etc.

(a) *Bell v. Willison*, 9 S. 267.

(b) *Watson v. Marshall*, 1782, M. 7009.

(c) *Robertson v. Gilchrist*, 25 Jan. 1828, 6 S. 446.

(d) *Shaw's Bell's Com.* 657.

(e) *Clark v. Brebner*, 1759, M. 4471; *Wardlaw v. Maxwell*, 1715, M. 4500; *Fraser v. Johnston's Trs.*, 11 July 1821, 1 S. 122; *Stewart v. Macdonald*, 21 Nov. 1826, 5 S. 29.

(f) 21 & 22 Vict. c. 56, §§ 9 & 15.

(g) 21 & 22 Vict. cap. 56, §§ 12, 13, 14.

(h) See *Clelland v. Weir*, 10 Mar. 1848, 10 D. 924; *Thomson v. Campbell*, 14 June 1837, 15 S. 1183; *Barrington v. Inglis*, 5 Dec. 1857, 20 D. 231; *Anderson v. M'Culloch*, 29 Jan. 1846, 8 D. 419.

(i) *Donaldson v. Ord*, 5 July 1855, 17 D. 1053.

corroboration (a). It will also be the duty of executors succeeding to a subsisting executry trust, not wound up, to take all proper measures for calling the former executors or representatives to account; and they will not be entitled to exoneration, as a matter of course, on accounting for the funds to which they have confirmed, should the beneficiaries insist on an investigation of the previous management (b). The Court will not award sequestration of the estates of a deceased debtor, or appoint a factor under the Bankruptcy Act, if his executors are willing to administer (c).

Recovery of Assets. Trustees have a discretion as to bad Debts.

It is the duty of a trustee, as soon as he has qualified himself by confirmation, to take active measures for realizing the trust's assets and property. Executors, however, are not bound to engage in fruitless litigation; and in an action against executors, for neglecting to take proceedings upon a bill of exchange of which the settler was holder, it was held to be a sufficient defence, that the executors had information that the bill was granted for accommodation. The fact that they had, at the request of the beneficiary, raised an action after the elapse of the sexennial prescription, in which the defender, on a reference to oath, deponed negative, was considered immaterial (d).

Meaning of rule that Executors charged with interest after one year.

It has been laid down in works of authority, that executors are allowed a year for the collection and realization of the assets of the defunct (e), during which time they are not chargeable with interest. The meaning of this rule, as observed by Lord Jeffrey, in commenting upon its application to entail cases, is that they are not to be chargeable for interest on outstanding debts during the first year, *beyond the amount which they may have actually received* (f). After the lapse of a year, they are presumed to be in default, and will be charged with interest, unless they are able to show that the failure to recover was not attributable to their neglect (g).

(a) *Thomson v. Campbell*, *supra*. See also *Gray v. Walker*, 11 Mar. 1859, 21 D. 709.

(b) *Nicol v. Carnie*, 10 June 1856, 18 D. 1000.

(c) *Milne v. Milne*, 13 June 1850, 12 D. 1007; *Gilmour v. Mure*, 18 July 1850, 12 D. 1266. See *Pet. Macfarlane*, 6 Mar. 1857, 19 D. 656.

(d) *More's Exrs. v. Malcolm*, 24

Jan. 1835, 13 S. 313. In the same case, executors were held not liable for referring a doubtful claim to arbitration.

(e) *Shaw's Bell's Com.* 658; *Bell's Pr.* § 1900; *Campbell v. Reid*, 15 June 1840, 2 D. 1084.

(f) *Howat's Trs. v. Howat*, 17 Feb. 1838, 16 S. 627, note.

(g) See p. 313, as to realization of precarious securities.

With a view to facilitate the recovery of assets, trustees may enforce delivery of all documents of debt belonging to the trust; and they are entitled to call for statements of accounts from bankers or others alleged to be in possession of the trust funds, and, if necessary, to call for the production of documentary evidence (*a*). But they cannot enforce the unconditional delivery of documents to which other parties have a preferable right.

Trustee's right
to call for
Documents.

In the administration of the trust, a demand made against a debtor to the estate cannot be met by setting off a debt due to the debtor by the trustees, who make the demand; there is no *concur-sus debiti et crediti* (*b*). Neither is there concurrence where a trustee demands a private debt from one who is a creditor under the trust. But where a demand is made by trustees for a debt due to the trust estate, it may be met by a debt due under the trust to the defender. Again, where the debtor of the trustee is called on to pay a private debt, he being a creditor under the trust, and the trustee the *sole* intromitter, there is room for doubt whether there may not be compensation (*c*).

Compensation
as to Trust
Debts.

Trustees cannot be too anxiously reminded that any delay in the recovery of debts due to the estate will be at their own personal risk; the fact that the testator had left the money in the hands of one of their body, or invested on personal security being no justification to executors who neglect the primary duty of bringing the trust funds into a position of security (*d*). A trustee will, on the same principle, be liable for any loss sustained by the estate in consequence of his discharging a security, or improperly consenting to the liberation of a debtor (*e*).

Diligence pres-
table from
Trustees.

In *Forman v. Burns* (*f*), an executor found among the securities of the defunct a promissory note for L.250, dated more than

Consequences
of delay in
using Dil-
igence.

(*a*) *Clark v. Mitchell & Ors.*, 17 June 1825, 4 S. 102; and see *Wother-spoon v. Laidlaw*, 17 Nov. 1843, 6 D. 88; *MacLachlan v. Meiklam*, 9 July 1857, 19 D. 960.

(*b*) Ball Com. 5th Ed. I. 39.

(*c*) See *Hay v. Brown*, 22 Dec. 1825, 4 S. 344; and cases in Digest, voce "Compensation," pp. 293-4.

(*d*) *Moffat v. Robertson*, 31 Jan. 1834, 12 S. 369; *Marshalls v. Milne*, 1677, 1 Br. Sup. 780; *Forman v.*

Burns, *infra*. In *Gourlie v. Dumbreck*, 1710, M. 16192, a trustee, who admitted that he had received a payment to account, but neglected to preserve evidence of the amount, was charged with the whole sum.

(*e*) *Abercrombie v. Innes*, 1724, Robertson, 467; *Stirling v. Cunningham*, 1639, M. 16163.

(*f*) *Forman v. Burns*, 2 Feb. 1853, 15 D. 362.

two years prior to his death, and payable one day after date. Instead of immediately raising action on the note, the executor allowed two months to elapse, and then wrote, through his agent, requesting payment. The demand was repeated several times in the course of the ensuing three months, and the debtor then transmitted his brother's acceptance for L.280, as an additional security. Ultimately, but not till fifteen months after the date of confirmation, a payment of L.50 to account was obtained, and the principal debtor soon after became bankrupt. A claim having been made by the representatives of the payee against the executor, on the ground that he had neglected timeously to use diligence on the bill, it was urged in defence, that, from the executor's knowledge of the circumstances of the obligant "he believed that any premature use of diligence might greatly injure the chance of speedy or ultimate recovery;" also, that he was himself largely interested in the estate, and that his office being gratuitous, he was not liable in exact diligence. The Court, with great reluctance, found that the executor was liable for the consequences of his omission; Lord President M'Neill observing, with regard to his position as a beneficiary, that it was no excuse that an executor chose to risk himself as well as the executry fund. Lord Fullerton said, "This is one of the hardest cases I ever met. The executor, on coming into office, found this bill as an investment which the deceased himself had entered into years before his death; and I think he was entitled to exercise some discretion as to continuing the investment, or enforcing payment. It is true that he gave time to the debtors; but I am hardly satisfied that he did so entirely out of tenderness for them. I think he may have been in some degree influenced by the hope, that if he did not press too hard, there would be a better chance of recovering the debt. But executors must be taught that they are bound to exercise some diligence; and on that broad principle, I think the safest course is to adhere" (a).

No excuse that
Executor had
a joint in-
terest in the
subject.

Agents and
Factors bound
to use Dil-
gence.

A party in the position of an agent, factor, or manager, who is paid for his services, is of course, *a fortiori*, liable for any neglect in using diligence upon the debts which he is entrusted to recover (b).

(a) 15 D. 364; compare the English case of *Lawson v. Copeland*, 2 B. C. C. 156.

(b) *Wemyss v. Wilson*, 1674, M. 3538; *Stark v. Mackay*, 1714, M. 3540. See *contra*, *Stewart v. Fal-*

On this principle, the trustee of a sequestrated estate having neglected to present an abbeverment of adjudication for registration, as directed by the statute, was amerced in the expense of an application to the Court for a special warrant for registration (a).

It appears from the cases cited by Mr Lewin (b), that trustees subject to the jurisdiction of the Court of Chancery are, in like manner, accountable for the consequences of negligence in the recovery of assets. In one of the leading cases, Sir Thomas Plumer remarked,—“If persons accept the trust of executors, they must perform it; they must use due diligence, and not suffer infants to be injured by their negligence. If there be *crassa negligentia*, and a loss sustained by the estate, it falls upon the executors” (c).

Practice of
the Court of
Chancery.

It is scarcely necessary to caution trustees against the danger of allowing the trust funds to remain, on personal security, in the hands of one of their own number. Even in the somewhat favour-

Lending Trust
Money on Per-
sonal Secu-
rity.

coner, 14 Dec. 1830, 9 S. 178—a bad precedent.

(a) *A. B.*, 21 Dec. 1855, 18 D. 286.

(b) Lewin, Tr., 4th Ed. 220.

(c) *Tebbs v. Carpenter*, 1 Mad. 296.

In this case the rents of certain real property were vested in executors, upon trust, for the purpose of accumulating the proceeds, and arrears were allowed to accumulate to the extent of L.1500. The executors were charged with the whole sum, but without interest. In *Caffrey v. Darby*, 6 Ves. 488, trustees to whom a leasehold property, with stock-in-trade, etc., had been assigned, subject to the proviso that the truster's husband should be allowed to remain in possession so long as he paid the instalments mentioned in the deed, were made responsible for the loss accruing to the wife, in consequence of their allowing the husband to remain in possession after he had failed to pay up the stipulated instalments. In *Booth v. Booth*, 1 Beav. 125, 8 L. J. Ch. 39, and *Lincoln v. Wright*, 4 Beav. 427, 10 L. J. Ch. 381, Lord Langdale held co-executors liable for property of the testator left in the hands of the acting executors.

More recently, Lord Cottenham, on a careful review of the previous authorities, and with the declared intention of settling the principles of this branch of law, pronounced decree against two executors for the sum of L.12,000 and upwards, which was due by their co-executor to the testator at the time of his death, and which was lost in consequence of the bankruptcy of the executor six years thereafter (*Stiles v. Guy*, 1 Macn. & G. 422, 19 L. J. Ch. 184). This was a strong case, for by the will the trustees were not to be “answerable for any more of the trust monies than they should respectively receive, but each for his own acts, receipts, and wilful defaults only;” and the direction was to realize and get in “securities for money not approved by them.” But, said the Lord Chancellor, “The direction in the will, that the creditors should call in securities not approved by them, must be considered as referable to securities upon which a testator's property might, from their nature, be invested, and not as authorizing a kind of investment which a court of equity could not sanction” (19 L. J. Ch. 187).

Duty when
Trust Estate
consists of a
going Busi-
ness.

able case of the loan having been advanced by the testator himself, the co-trustees have been held liable in one case for loss (a); and in another, the borrower has been held accountable for a share of the profits of his business earned by means of the capital lent to him (b).

Trustees are placed in a most difficult and trying position when the bulk of the trust estate consists of a share in a going business, and no special power is given to them to carry it on for the benefit of the family (c). Where the amount which could be realized by the sale of the good-will and stock-in-trade is small in proportion to their value as part of a going concern, trustees will often, from a regard to the real interests of their constituents, elect to continue the business, and run the risk of liability in the event of failure. If a trustee does not feel justified in exposing himself to the hazard of personal liability, he ought, if he believes that the continuance of the business is the most prudent course of administration, to decline the trust, and leave the responsibility of management to the Court. Should he, on the contrary, think that the ultimate realization of the concern is more to the advantage of the family, he may accept the office with safety; for he is under no obligation to damage the property by forcing on an immediate dissolution of the concern. On the contrary, it will be his duty to wind up cautiously, and so as, if possible, to secure full value for the capital and skill already embarked by the truster in the business. If there are other partners, he must take care that his constituents are allowed their full share of profits while their money remains in the concern, and by no means agree to any arrangement for leaving it in the business on loan (d). It must be added, that trustees who take the management of a business, even for no other purpose than that of immediate winding up, are not entirely exempt from personal risk, because they are not only liable *ad factum præstandum* for the fulfilment of contracts, but may also come under liability to

(a) *Moffat v. Robertson*, 31 Jan. 1834, 12 S. 369.

(b) *Cochrane v. Black*, 1 Feb. 1855, 17 D. 322; 16 July 1857, 19 D. 1019. See the leading English case, *Stiles v. Guy*, and others, in note to last paragraph. On the question of liability for lending on personal security, the reader is referred to Section IV.

(c) See an instance of such a power in *Ross v. Masson*, 3 Feb. 1843, 5 D. 483.

(d) *Cochrane v. Black*, *supra*; *Laird v. Laird*, 26 June 1855, 17 D. 984; 28 May 1858, 20 D. 972; *Guthrie v. Fairweather*, 16 Dec. 1853, 16 D. 214; *Graham v. Keble*, 10 Nov. 1813, 2 Dow, 17.

creditors, as parties to bill transactions and the like, against which they have only the security of the trust estate (a).

Shares in joint stock companies do not materially differ from partnership interests as regards their eligibility for the purposes of trust investment. In the present uncertainty of the law on this subject, trustees cannot be advised to continue such investments, as even where they are expressly authorized the trustees may incur liability to creditors. As to the time within which they ought to realize, there is no positive rule. In the recent English case of *Hughes v. Empson* (b), where the testator died possessed of Crystal Palace shares, it was held that the trustees had a discretion not to sell until the end of twelve months; and in a previous case, Lord Cottenham decided that executors were justified in continuing to hold Mexican bonds which they only sold in the course of the second year from the testator's decease (c).

Duty when Trust Estate consists of Shares in Joint Stock Company.

In the well-known case of *Baird* (d), the Accountant of Court, acting under the authority of the Pupils Protection Act, had appointed the respondent to consign a sum of upwards of L.25,000, the property of a minor, which had been lost in consequence of the tutor having neglected to sell out of the Western Bank. But the Court would not presume that the respondent had acted indiscreetly in holding for the period of two years; for, as Lord Deas observed, there was no rule requiring the tutor to sacrifice the estate by immediate realization; and where, as in this case, the estate, valued at more than L.150,000, consisted mainly of shares in joint stock iron and other companies, which could not have been thrown at once into the market and disposed of, except at a ruinous sacrifice, his Lordship thought it would have been a positive dereliction of duty to sell with precipitation (e).

Acc. of Court v. Baird.

A less rigorous view of the responsibility of trustees has been taken with reference to charges of alleged omission or neglect in the collection of rents, or other debts prestable during the continuance of the trust. In realizing the truster's assets, there is little

Management of Heritable Property.

(a) *Thomson v. Campbell*, 16 Feb. 1838, 16 S. 560; and see Chap. XXIII. *infra*, on the liability of Trustees to Creditors.

(b) *Hughes v. Empson*, 22 Beav. 181.

(c) *Buxton v. Buxton*, 1 M. & C. 80; and see *Orr v. Newton*, 2 Cox, 276.

(d) *Acct. of Court v. Baird*, 29 June 1858, 20 D. 1176.

(e) 20 D. 1184-5.

room for discretion or forbearance, the executor having an imperative duty to perform, namely, to reduce into possession the whole of the trustor's available means and estate, as it exists at his entry on the duties of his office. But in the case of a continuing trust, other considerations come into view. A trustee of heritable property must act as a prudent landlord, administering the trust property in the same manner as he would manage his own; and it must always be a matter of discretion in the management of property, whether to press for immediate payment at the risk of crippling the resources of the tenant. The management of an estate, although infinitely less speculative in its nature than that of a mercantile business, carries with it the risk of occasionally making bad debts; and if the Court is satisfied that the management has been on the whole beneficial, it will not, and it would be unjust that it should, enforce the rules of strict diligence against trustees in respect to any arrears of moderate amount which they may have failed to reduce into possession (a).

Examples.

On this principle it was held that trustees had not exceeded the bounds of discretion in discharging certain arrears of rent, when such discharge was made one of the conditions on which the tenant agreed to accept a renewal of his lease at an increased rent (b). The Court, however, have disapproved of a course of management under which the tenant was allowed to be systematically in arrear, the trustees taking bills for the rents; and should loss result from indulgence of this kind, there can be little doubt the trustees would be liable for the deficiency (c). In the granting of abatements to tenants, and of allowances for improvements, trustees will use the same discretion as fee-simple proprietors (d).

Trustees
adopting Lease
incur Liability
for Arrears of
Rent.

A trustee, whether acting under a testamentary disposition or for behoof of creditors, ought to be careful not to enter rashly into the possession of tacks or leasehold interests; both because the management

(a) *Cameron v. Anderson*, 12 Nov. 1844, 7 D. 92; *Miller's Trs. v. Miller*, 23 Feb. 1848, 10 D. 765. See *Ersk.* 3, 3, 35.

(b) *Edmond v. Dingwall's Trs.*, 16 Nov. 1860, 23 D. 21. In the same case the trustees were found entitled to take credit for a considerable sum, expended in draining the estate.

(c) Per Lord J.-C. Hope in *Dundas v. Morrison*, 20 D. 228.

(d) *Gill v. Earl of Fife's Trs.*, 8 July 1823, 2 S. 460; see *Kay v. Miln*, 4 Feb. 1830, 8 S. 437. As to the trustee's power to execute improvements at his own hand, see Chap. XXI. Sec. 2 (Powers).

of a farm or of subjects leased in connection with a going business is attended with hazard to the estate, and also because the unconditional adoption of a lease will render the trustee himself personally liable for arrears of rent due prior to the period of his entry (*a*). In the case last cited the landlord had accepted bills for the unpaid arrears prior to the date of sequestration; and it was argued, but unsuccessfully, for the trustee on the sequestered estate, that he had thereby abandoned his personal recourse against the trustee as assignee of the lease, and was therefore only entitled to rank as a creditor. The Lord Justice-Clerk Hope observed: "The known rule of law must apply, that the assignee of a lease is liable for unpaid arrears of rent; that is the burden which attaches to the assignee of a lease—in the same way as liability for unpaid feu-duties attaches to the purchaser of property. It is the corresponding duty of each to see that the property is clear of all bygone claims; if he does not do so, it is at his own risk" (*b*). The trustee will therefore consult his own safety by arranging with the landlord to waive any preference for prior arrears, or obtaining his accession to the trust—which has been held to imply a waiver of such preference (*c*). A trustee may render himself liable in damages to the landlord by retaining possession of the subjects, and refusing to concur in an arrangement for a lease to a third party, even in circumstances which do not imply an adoption of the lease (*d*).

When money is paid to a body of trustees, whose concurrent receipt and acknowledgment is necessary to warrant payment and to discharge the debtor, the payment is made equally to all, not only in the estimation of law, but in fact (*e*). However, as both trustees cannot actually receive, although they both must join in signing the receipt, the money may be uplifted by one, for the purpose of *immediate* investment, without responsibility on the part of concurring trustees (*f*). But if the sum is large, the safer course is,

Signing Receipts for Money is an act of Intromission.

(*a*) *Fairlie v. Neilson*, 18 Dec. 1821, 1 S. 222; *Stead v. Cox*, 20 Jan. 1835, 13 S. 280; *Dundas v. Kirkaldy's Trs.*, 21 June 1853, 15 D. 752; 4 Dec. 1857, 20 D. 225.

(*b*) 20 D. 228.

(*c*) *M'Gregor v. Hunter*, 21 Nov. 1850, 13 D. 90.

(*d*) *Stead v. Cox*, *supra*.

(*e*) Per Lord J.-C. Hope in *Seton v. Dawson*, 4 D. 320.

(*f*) *Urquhart v. Brown*, 7 June 1843, 5 D. 1142; but see *Macnair v. Bloomfield*, 24 June 1830, 8 S. 969; and *infra*, Chapter XXIV., Section 3, as to joint liability.

that it should be at once deposited in bank, and placed to the account of the trust estate without being paid to either trustee personally; otherwise, in the event of the money being retained by one of them for any length of time, his colleagues will undoubtedly be liable for the failure of their co-trustee (a); a liability from which no clause of indemnity for acts of omission can afford protection (b).

Debtor paying to Trustees is not bound to see to the application.

By the law of Scotland, executors confirmed have power to grant effectual discharges for all moveable funds or effects of the defunct ingathered by them. Debtors are therefore safe to pay on demand, without requiring to see to the application of the money (c). And it would seem that a debtor paying to an English administrator whose title is unexceptionable (d), is safe from any claim at the instance of a Scotch executor afterwards appointed (e). In the event of the death of one of several executors-creditors, the debtor is not bound to pay to the survivors, but may insist on confirmation being expedite to the share of the deceased creditor, in order that his executor may be made a party to the discharge (f).

Debtor may be liable if participant in a Fraud.

It must be understood, however, that the executor's receipt will not protect the debtor from liability if he has been participant in a misappropriation of the fund, or has knowingly paid it on the order of the executor to the individual account of the latter (g). In the case of *Taylor v. Sir William Forbes & Co.*, the executor was partner in a concern which was largely indebted to the same bank in which the trust funds were deposited. Being pressed for payment, the executor ordered the trust funds to be transferred to the account of the company of which he was a member; and that company having

(a) *M'Clymont v. Hughes*, 14 Feb. 1827, 5 S. 346; *Kennedy v. Wightman*, 28 June 1827, 5 S. 852.

(b) *Moffat v. Robertson*, 31 Jan. 1834, 12 S. 369; *Seton v. Dawson*, 18 Dec. 1841, 4 D. 310.

(c) In England there seems to be some doubt as to the power of a trustee to grant a discharge which will relieve the debtor from the necessity of inquiring as to the application of the money. The tendency of the recent cases respecting payment of personalty debts is towards the recognition of the Scotch doctrine; but the law as to payment of the price of real estate is

still involved in uncertainty. See this subject considered in connection with Trusts for Sale (Chapter XXVII., § 2).

(d) See Lewin on Tr., 4th Ed. 223; and cases of *Glynn v. Locke*, 3 Dru. & War. 11; *Fernie v. M'Guire*, 6 Ir. Eq. R. 137, & *Ford v. Ryan*, 4 Ir. Ch. R. 342, there referred to.

(e) *Hutchison v. Aberdeen Banking Co.*, 9 June 1837, 15 S. 1100.

(f) *Morris v. Stewart*, 28 Feb. 1852, 12 D. 576.

(g) *Taylor v. Sir W. Forbes & Co.*, 14 Dec. 1830, 4 W. & S. 444, revg. 5 S. 785; *Barnet v. Duncan*, 14 Dec. 1831, 10 S. 128.

soon after become insolvent, an action was raised against the bankers by a beneficiary under the will, to recover the money which had been thus fraudulently transferred. The Court of Session assailed the bankers, on the ground that they were not bound to inquire into the terms of the trust settlement; but the House of Lords, being satisfied that the law agents of the banking company were *actually cognizant* of the trust, reversed the interlocutor, and directed an issue to try the question, whether, when the respondents received the money, they knew that it was part of the estate of the defunct, and that the executor held it subject to the trusts declared by his will (a). This decision may be supported on the general principle, that the beneficiary is entitled to follow the trust funds into the hands of any party receiving them in wilful contravention of the trust purposes; a principle which was distinctly recognised in our older practice (b).

The consideration, on the one hand, of the great importance (viewed in relation to the comfort and well-being of families) of ensuring the acceptance of trusts by persons of the truster's own selection, or appointed by those who possessed his confidence; and, on the other hand, of the inconvenience and hazard inseparable from the continued administration of trust estates by gratuitous trustees, unable to give more than an occasional and intermitting attention to the interests of the trust, have led in Scotland to the introduction of the system of management through the intervention of paid factors, under the supervision and subject to the control of the trustees. Trustees are generally empowered to name a factor by the terms of the trust settlement; and independently of special authority, they seem to have the power at common law (c). Sometimes a factor is nominated in the settlement; in which case it has been considered that the trustees have not the power of superseding him, unless upon some reasonable ground of complaint (d). The duties of factors are necessarily the same as

Management
of the Estate
by Factors.

(a) 4 W. & S. 455.

(b) *Tait v. Kay*, 1779, M. 2142; *Alison v. Fairholme*, 1765, M. 15192.

(c) *Sym v. Charles*, 13 May 1830, 8 S. 741; Bell's Pr. § 1998. In trusts where the appointment of a factor may not be considered necessary, the trustees are still entitled to perform the

duties of the office, so far as not discretionary, through the instrumentality of a paid agent (*Hay v. Binny*, 19 Feb. 1861, 28 D. 594).

(d) Bell's Pr. § 1998; *Fulton v. M'Allister*, 15 Feb. 1831, 9 S. 442; *Craig v. M'Aulay*, 22 June 1836, 14 D. 318.

those of the trustees whom they represent. It is therefore unnecessary to treat of them as a separate topic. The subject of the liability of trustees for their factors will be discussed in another chapter (a).

SECTION II.

OF THE SAFE CUSTODY OF THE ESTATE.

Responsibility
for the preser-
vation of the
Estate.

By the civil law, a mandatory, although he could take no benefit by the contract, was liable in exact diligence (b); but the doctrine of the law of Scotland is different, being founded on the broad principle, that the nature of the diligence prestable depends upon the interest which the contracting party has in the fulfilment of the contract. The office of trustees being gratuitous, they are accordingly held to be liable only for actual intromissions, and for such diligence in respect to matters omitted as they might be expected to employ in their own affairs (c). "The Court," said Lord Justice-Clerk Hope, "will judge favourably and leniently and kindly of gratuitous trustees, when they have addressed themselves to the performance of their duty, have taken steps and given the directions which might be expected, but have unexpectedly failed to do what they proposed, especially if from the fault of others" (d). Trustees are called upon to exert special solicitude in the management and custody of funds actually reduced into possession; because the participation in any act of possession, actual or constructive, is regarded as an intromission; and the trustee becomes from that time responsible for the custody of the property.

Loss by Rob-
bery;

It may safely be laid down, on the authority of English prece-

(a) See Chapter XXIV., Sec. 4.—The question, what Court has authority to enforce the administration of a trust—might be considered in this place; and in the concluding paragraph of the chapter on Foreign Law, we have referred to this chapter upon the point. However, on further consideration, we have thought the subject would be better understood when viewed in con-

nection with the beneficiary's right of action against the trustee. To the chapter on that subject we accordingly refer.

(b) Cod. 4. Tit. 35, L. 13.

(c) Erak. 3, 3, 36; *Seton v. Dawson*, 18 Dec. 1841, 4 D. 328, per Lord Moncreiff.

(d) 4 D. 324.

dents, that trustees will not be liable for the loss of property by robbery (a). It will be understood, however, that if trust funds are improperly retained by the trustee in his own custody, when they ought to be invested or deposited in bank, he will be answerable for the loss. It has been held by the Court of Chancery, that an executor is not answerable for the loss of uninsured house property by fire (b); but we do not think that a trustee could safely neglect such a usual precaution, at least in the case of urban subjects.

Trustees are responsible for the safe custody of title-deeds and other documents belonging to the trust (c); and they are bound to exhibit to the heir or other party having an interest (d). It has been found that testamentary trustees are not entitled to withhold delivery of papers found in the repositories of the defunct, which were the property of certain beneficiaries against whom they tended to establish a charge of circumvention; but, in the circumstances, the documents were allowed to be inspected by a judicial commissioner, and an inventory taken, specifying the documents by date and post-mark. Trustees have been also held entitled to interdict against removal of the title-deeds and securities of the trust estate pursuant to an order of the Court of Chancery in England, in so far as affecting property as to which the forum of distribution was in Scotland (e).

It is the duty of trustees to deposit in bank, in a separate account (f), all monies lying in their hands, whether for distribution or for the purpose of investment, at a suitable opportunity; and if the bank is in good credit, they will not be answerable for loss in the event of failure (g). Judicial factors subject to the rules esta-

(a) *Morley v. Morley*, 2 Ch. Ca. 1; 1843, 6 D. 88; *MacLachlan v. Meiklam*, 9 July 1857, 19 D. 960.

(b) *Bailey v. Gould*, 4 Y. & C. 221; 9 L. J. Exch. Eq. 48. In this case Mr Baron Alderson said, that the loss of the property—the building in question—was not the fault of the trustees; and as to the alleged breach of duty in not insuring, it appeared that the surviving partner, who was also interested to insure, had not considered it necessary, which was a fair criterion in a question of wilful neglect.

(c) *Wotherspoon v. Laidlaw*, 17 Nov. 1843, 6 D. 88; *MacLachlan v. Meiklam*, 9 July 1857, 19 D. 960.

(d) *Liddell v. Wilson*, 19 Dec. 1855, 18 D. 274; overruling *Cathcart v. E. of Cassilis*, 1795, M. 3993; and see *Douglas v. Holmes*, 19 July 1854, 16 D. 1116; *Wilson v. Gilchrist's Tr.*, 18 D. 636.

(e) *MacLachlan v. Meiklam*, *supra*.

(f) If he deposits the funds to his own credit, he will be liable in penal interest; *Clark v. Boswell*, 17 Dec. 1856, 19 D. 187.

(g) *Pearson v. Grierson*, 19 Nov.

by Fire.

Custody of Title-deeds.

Uninvested Money ought to be deposited in Bank.

blished by the Pupils Protection Act, are required to lodge money in their hands in some one of the banks of Scotland established by Act of Parliament or Royal Charter, in an account or on deposit in their names, as judicial factor on the estate (*a*). Although it has never been decided in Scotland that trust money must be lodged in a *chartered bank*, it has been the practice to do so; and it would not be safe to deposit any large sum in the hands of a private banking company.

Transference
of Funds to
Judicial Factor
or new Trustee.

In the event of the trust devolving upon other parties, which may happen by the resignation of the original trustees under a power, or under the provisions of the Trustee Act, 1861, or in consequence of the appointment of a judicial factor, the original trustees are not bound to pay to their successors individually, but may transfer the funds to the credit of their bank account, or make consignment in a pending process (*b*). But a beneficiary is not entitled, upon raising a multiplepinding, to demand consignment of trust money invested in bank in name of a sole trustee, against whose management no complaint has been made; "for," said Lord President M'Neill (*c*), "consignment imposes a limit upon the revenues to be derived from the fund, for the trustee might find a safe investment to yield a better interest than bank interest" (*d*).

Money left
deposited in
Bank.

Trustees are not liable for the loss of money deposited in bank by the truster, and left there until an investment is obtained (*e*).

1825, 4 S. 205; *Seton v. Dawson*, 4 D. 328, per Lord Moncreiff.

(*a*) 12 & 13 Vict. c. 51, § 5.

(*b*) *Mackenzie v. Grieve*, 20 Dec. 1828, 7 S. 223; and see *Watson v. Crawcour*, 9 June 1843, 5 D. 1182. The unfortunate results of payment to the new administrator are exemplified in the case of *Donaldson v. Kennedy*, 18 June 1833, 11 S. 740, where a trustee had to refund, although protected by a clause of indemnity.

(*c*) Lord Colonsay.

(*d*) *Kerr v. James*, 27 May 1857, 19 D. 753.

(*e*) *Gibb v. Gibb*, 1769, M. 16363; *Pearson v. Grierson*, 19 Nov. 1825, 4 S. 205. In *Johnston v. Newton*, 11 Hare 169, 22 L. J. Ch. 1039, Vice-Ch.

Wood dismissed a suit against executors for recovery of funds left in the hands of the testator's bankers, and which had been lost by the failure of the bankers within twelve months after the testator's death. As to the general principle, the Vice-Chancellor had no doubt: as the testator could not any longer exercise a discretion in judging of the position of the bankers, the trustee must exercise *his* discretion, and if he erred, must bear the loss. But in this case, the executors were bound, in the first place, to look to the various liabilities of the estate before settling with the residuary legatee; and the rule was, that they had twelve months to do this. The money was properly left at the bankers', for the trustees

Thus, in a case where a Scotch executor found the residue of the succession, consisting of upwards of L.7000, deposited in the hands of a private banking company in England, who paid five per cent. interest upon deposits, and he did not think it necessary to disturb the investment, and the bankers afterwards became insolvent in consequence of the failure of their London correspondents, the Court, reversing the interlocutor of the Lord Ordinary, found that the executor was not liable for the loss. It was observed, that if he had made choice of the bank, and placed the money there, the presumption would have been against him; but as he had found the money, producing interest at five per cent., in a bank in good credit, he was not bound to disturb the testator's investment (a).

A trustee will be answerable for injury resulting in consequence of his putting the securities of the estate beyond his control, as by investing in the joint names of himself and another party (b), or by delivering a bond or other document of debt before the full consideration has been paid for it (c); in which case, it would seem, the document itself may be recovered at the suit of the beneficiary (d). But if the security is taken by trustees in favour of beneficiaries who have the residuary interest, the Court will not hold the trustees precluded from resuming possession of the funds for the benefit of those who may be found to have a preferable interest (e). Trustees amenable to the jurisdiction of the Court of Session ought not to invest in foreign securities. If it should happen that the testator's assets are situated beyond the jurisdiction of the Court, the trustee who has realized cannot escape from his obligation to account to the Court of Session by alleging that he is under a similar obligation to the courts of the foreign country; for, although it may be necessary *pro forma* to assume the character of administrator in the *locus rei sitæ* for the purpose of recovering the estate, the admini-

Neglect of
Duty by put-
ting Funds
or Securities
beyond Trus-
tee's control.

Foreign
Securities.

were not bound to know that no more debts would be brought forward, nor were they bound to distribute until the expiration of twelve months. But see *Spade v. Smith*, 3 Russ. 511, "rather a strong case, and a hard one" (per Wood, V.C., in *Johnston v. Newton*, *supra*).

(a) *Pearson v. Grierson*, 4 S. 207.

(b) *Accountant of Court v. Geddes*, 29 June 1858, 20 D. 1174.

(c) *Thomson v. Christie*, 16 June 1852, 1 M'Q. 236.

(d) See *Mair v. Thom's Trs.*, 20 Feb. 1850, 17 D. 748.

(e) *Buik v. Pattullo*, 14 Nov. 1854, 17 D. 45.

Wilful misappropriation.

stration of the funds, after reduction into possession, cannot be subject to a divided responsibility (a). It is unnecessary to add, that a trustee who deliberately misappropriates the trust estate, as by conveying trust property to a stranger, or by uplifting consigned money and applying it to his own purposes, is guilty of a punishable offence. In cases of this description, the Court may direct proceedings to be instituted against the trustee, and, if he is an agent, may remove him from the rolls (b).

Trustee bound to submit to opinion of Majority.

A trustee of funds invested in the joint names of himself and other trustees, is bound to concur with his colleagues in uplifting the funds, as well as in other necessary acts of administration; for, by accepting the office of trustee, he agrees to submit to the opinion of the majority, and if he were permitted to resist that opinion, he would be virtually in the position of a *sine qua non* (c). If he conceives that the proposed act of administration is illegal or unsafe, his remedy is to apply to the Court for the supersession of the trust.

Appointment of a Managing Trustee.

By the Trustee Act, 1861 (d), it is declared that trusts shall be held to include a provision that each trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts or intromissions of co-trustees, and shall not be liable for omissions. But the protection accorded to trustees by a clause in these or similar terms, does not differ materially from that which they enjoy at common law. Where the nature of the trust is such as to require a continuing management, it would be inconvenient and impracticable to insist upon every intromission being accredited by the whole body of the trustees. It is not unusual in such cases, more especially if authority to that effect is given by the settlement, to confer the powers of a factor on one of the trustees. Even where there is no continuing management, it may be necessary, for the

(a) *Blackett v. Gilchrist*, 30 May 1832, 10 S. 590; *Ferguson v. Menzies*, 21 May 1830, 8 S. 782; *Simpson v. Doud*, 1 Feb. 1855, 17 D. 315; *Account. of Court v. Geddes*, 29 June 1858, 20 D. 1174.

(b) *Account. of Court v. Dewar*, 8 Dec. 1853; & 7 Feb. 1854, 16 D. 163, 489; *Steven's Trs. v. Fraser*, 8 Mar. 1836, 14 S. 676. And if a trustee

mix trust property with his own, the beneficiary is entitled to any portion of the blended property which the trustee cannot prove to be his own. See *Gray v. Haig*, 20 Beav. 219; and *Duke of Leeds v. Amherst*, 20 Beav. 239 (Rolls Court).

(c) *Lynedoch v. Ouchterlony*, 15 Feb. 1827, 5 S. 358.

(d) 24 & 25 Vict. c. 84, § 1.

more convenient distribution of the funds amongst a number of beneficiaries, to authorize one of the trustees to make drafts upon the joint account. It has been held, where such a power was given for the *bona fide* purpose of facilitating the immediate distribution of the estate, that trustees were not liable for loss resulting from the malversation of the funds by their colleague (a). But no such indulgence will be granted to trustees who, after accepting the trust and realizing the estate, deliberately resign the future management of the fund into the hands of one of their number, without retaining the control over it, or taking any further interest in its management (b).

Liability for his acts.

In *Seton v. Dawson*, the trustees, after realizing the heritable property and signing the receipt for the price, devolved the entire management of the trust upon one of their number, James Kyd; and trusting apparently to a clause of protection in the settlement, which declared that they should not be "liable for omissions or neglect of diligence of any kind, nor *singuli in solidum*, but each only for his own actual intromissions," took no further concern in the management, and held no other meeting for upwards of eight years, by which time the managing trustee had become bankrupt and owed a large sum to the trust estate. The question of liability was referred to the whole Court, who, by a nearly unanimous judgment, decided that the trustees were responsible for the loss. "The trustees," said Lord Ivory (c), expressing what appears to have been the general opinion of the Court on the efficacy of a clause of protection, "were inexcusable for their total and reckless neglect of the estate which they had undertaken to administer. And even, therefore, had they by the most formal deed nominated Kyd (one of their own number) as factor, I should still have been of opinion that their not holding a single meeting as trustees for nine years after their acceptance, and their placing the whole funds of the

Seton v. Dawson.

(a) *Macnair v. Broomfield*, 24 June 1830, 8 S. 968; *Urquhart v. Brown*, 7 June 1843, 5 D. 1142.

(b) *Seton v. Dawson*, 18 Dec. 1841, 4 D. 311; *Sym v. Charles*, 13 May 1830, 8 S. 741; *Watson v. Crawcour*, 9 June 1843, 5 D. 1182.

(c) See also the leading opinion, p.

316 :—"Neither the protecting clause which occurs in this particular deed, nor any of the usual clauses framed for the same object, can be held to liberate trustees from the consequences of such gross negligence as amounts to *culpa lata*."

estate into Kyd's hands (for their concurrence in the deeds, which alone enabled him to get the money, amounts to no less), without ever from that moment taking a single step to compel him to account, or at all to ascertain what he was doing with the estate, was enough to bring the case up to that full measure of *crassa negligentia* which undoes all legal or equitable claim on their part to protection, even under such a clause in their favour as is here founded on. Clauses of this kind do not protect against positive breach of duty. And where one accepts of the office of trustee, and thereby undertakes, as he surely does undertake to some extent, to administer or superintend the administration of the estate which the trust places under his charge, what is it short of a breach of duty, when he stands wholly aloof and does absolutely nothing, leaving the estate in the meanwhile to run to ruin, not less effectually than if he had never taken upon him the office of trustee at all?" (a).

SECTION III.

OF THE PAYMENT OF DEBTS AND LEGACIES.

Power to sell
for payment
of Debts is
implied.

Payment of the trustor's debts forms necessarily a first preferable charge upon an executory estate, and, failing that, upon the trustor's lands. And if payment of debts is one of the expressed purposes of the trust, it would seem that there is an implied power to sell so much of the heritable estate as may be necessary to free it from debt (b); a power, the exercise of which cannot be interrupted by inhibition, though its validity may be tried in a suspension and interdict (c).

When Trustees are bound
to pay.

In private trusts for the distribution of a succession or management of property, the trustees are entitled, six months after the debtor's death (solvency being assumed), to pay, *primo venienti*—

(a) 4 D. 318; see also Lord St Leonards' remarks in *Macpherson v. Macpherson*, 11 June 1857, 1 M'Q. 245. On liability for factors and co-trustees, see Chapter XXIV., Sections 3 & 4.

(b) *Henderson v. Somerville*, 22 June 1841, 3 D. 1049. See on this subject Chapter XXI., Section 3.

(c) *Hay v. Morrison*, 7 July 1838, 16 S. 1273.

to the creditor first demanding payment, provided they are satisfied as to the subsistence of the debt (a). They are entitled, for their own protection, to have the debt constituted by decree; but they must not put the creditors to expense by unnecessary opposition (b). If an executor, even without the authority of his co-executors, pay legacies *bona fide* after the expiry of six months, it seems he is not liable in repetition to creditors (c). Where the trust settlement contemplates insolvency, or if, apart from intention, the estate is likely to prove insolvent (d), the trustees ought not to pay any creditor in full until they have made an investigation into its solvency; and they will not be allowed to take credit for payments made in the knowledge of the fact of insolvency (e). When exposed to double distress by creditors, their safest course is to bring an action for the judicial distribution of the estate. Under the older law, executry estates were frequently put to great expense by creditors procuring themselves to be decerned executors-creditors of the defunct for the amount of their debts, with the view of acquiring preferences. To remedy this abuse, the Act of Sederunt 28 Feb. 1662 was passed, which narrates the inconvenience experienced from the then state of the law, and for a remedy in time to come declares, "That all creditors of defunct persons using legal diligence at any time within half an year of the defunct's death, by citation of the executors and intromettors with the defunct's goods, or by obtaining themselves decerned and confirmed executors-creditors, or by citing of any other executors-creditors confirmed, the saids creditors, using any such diligence before the expiration of half an year, as said is, shall come in *pari passu* with any other creditors who have used more timely diligence by obtaining themselves decerned and confirmed executors-creditors or otherways" (f). The statute reserves the right of posterior creditors to be joined in the office of executors, and declares their liability for a proportionate

Distinction between solvent and insolvent trust-estates.

Pari passu diligence.

(a) *Gardner v. Pearsons*, 28 Nov. 1810, F.C.; *Alison v. E. of Donald's Trs.* 1793, M. 16211; *Rankine v. Gardiner*, *infra*.

(b) *Jackson's Tr. v. Black*, 31 May 1832, 10 S. 597; *Crawford v. Cook*, 16 Feb. 1833, 1 S. 406; *Gardner v. Pearsons*, *supra*.

(c) *More's Exrs. v. Malcolm*, 24 Jan. 1835, 13 S. 313.

(d) But see *Rankine v. Gardiner*, 1741, M. 16201.

(e) *Gardner v. Pearsons*, 28 Nov. 1810, F.C.

(f) See also the rescinded Acts 1654, cap. 16 & 18.

share of the expenses of the executor first confirmed. The effect of this enactment is, that the executor cannot be compelled to pay debts till the expiration of six months from the death, unless the estate is of indubitable solvency; for, if otherwise, it is the duty of the executor to preserve it for those who may fortify their claims by diligence before the elapse of the period of six months (a).

Trust may be reduced in case of Insolvency.

If the trustor were actually insolvent at the time of executing the settlement, it may be reduced by creditors in so far as gratuitous, under the first branch of the Act 1621, cap. 18, or if diligence has already been begun, under the second branch of the same enactment; and it would seem that at common law a trust deed, the benefit of which is confined to favoured creditors, or which is tainted with injustice in other respects, is reducible on the head of fraud (b).

Ranking of unsecured Debts.

In testamentary trusts, it is understood that all unsecured debts incurred prior to the testator's death are to be ranked *pari passu*, unless the deed otherwise directs. In trusts *inter vivos*, if the purpose of payment is limited to debts contracted before a specified time, posterior personal creditors may rank on the surplus estate, unless they are excluded by an onerous ulterior destination (c).

Maintenance of Family.

The right of the settlor's family to alimentary maintenance is a debt which transmits against trustees (d), or other general representatives (e) of the party liable; though it is otherwise where the heir

(a) Bell's Pr. § 1900. In England trustees and executors are allowed twelve months for the realization of the estate and payment of debts (per Lord St Leonards in *Macpherson's* case, 1 M'Q. 249; and see remarks of Vice-Chancellor Wood in *Johnston v. Newton*, 11 Hare, 160, 22 L. J. Ch. 1039).

(b) Bell's Com. 851 (5th Ed. I. 35); *Earl of Roseberry v. M'Queen*, 1 July 1823, 2 S. 815.

(c) *Wright v. Harley*, 2 June 1847, 9 D. 1151; *Turnbull v. Turnbull's Trs.*, 15 Apr. 1825, 1 W. & S. 80, revg. 2 S. 1; as to which, see remarks of Lords Jeffrey and Moncreiff, in *M'Leod v. Cunningham*, 20 July 1841, 3 D. 1288, 1306.

(d) *M'Ewan v. M'Ewan*, 10 Feb. 1842, 4 D. 662; *Pet. Taylor*, 5 Feb. 1850, 13 D. 948; see 949; *Dunbar's Trs. v. Shaw*, 13 Nov. 1805, Hume, 265; *Riddell v. Riddell*, 1802, M. App. Aliment, No. 4; *Ormiston v. Wood*, 22 Dec. 1838, 11 Jur. 232; *Miller's Trs. v. Miller*, 10 D. 765. See also *Gillespie v. Marshall*, 7 Dec. 1802, M. "Accessorium," No. 2; *M'Farlane v. Finlay*, 8 July 1825, 4 S. 158. *Hardman v. Guthrie*, 6 June 1828, 6 S. 920.

(e) *Scott v. Sharp*, 1759, M. "Parent and Child," No. 1; *Harley v. Harley*, 1671, M. 416, 5922; *Drummond v. Swayne*, 28 Jan. 1834, 12 S. 342; *Fenton v. Scott*, 26 May 1832, 4 Jur. 457.

does not represent his immediate ancestor, as in the case of heirs of entail (a); for, as the obligation transmits *jure representationis*, it cannot be binding on an heir of entail, who only represents the entailor. There can, of course, be no doubt as to the liability of an heir of entail to aliment those who have a claim against himself personally *ex debito naturale* (b).

Trustees are bound to give the beneficiary the benefit of any "eases" or abatements obtained in settling with the debtors on the trust estate (c). Abatements.

I. What Funds are liable for Payment of Legacies.

Legacies being in their own nature a burden on the executry estate, the executor cannot plead payment to the party having the residuary interest, in answer to an action by the legatee; for he is bound to fulfil the primary purposes of the trust before disposing of the reversion (d). If a legacy is expressly made payable out of heritage, the executor will, of course, be entitled to relief from the heir succeeding to the estate (e); but in the case of a general conveyance of heritable and moveable estate, subject to the burden of legacies, leaving an undisposed of residue, it has been decided that the personal funds must be exhausted before trenching on the resulting interest of the heir-at-law (f). In the event of the fund upon which a legacy is charged proving inadequate, the residuary estate is liable in the second order (g); but if the whole fund be given, that is a specific legacy; and of course nothing can be

Heritable and Moveable Estate, when liable for Legacies.

(a) See the latest cases, *Fletcher v. Fletcher*, 11 July 1838, F. C.; and *Jackson v. Gourlay*, 24 Dec. 1836, 15 S. 313.

(b) *Muirhead v. Muirhead*, 7 July 1849, 11 D. 1262; 15 Dec. 1849, 12 D. 356. See Chapter XXI. Section III. as to the jurisdiction of the Court to authorize advances for maintenance out of capital.

(c) *Earl of Northesk v. Carnegie*, 1762, 4 Br. Sup. 529; *Sinclair v. Marshall*, 1708, M. 16186; *Chalmers v. Cunninghame*, 1735, Elch. Tr., No. 3; *Anderson v. Lauder*, 1740, Elchies, Tr., No. 10; *Mazwell v. Mazwell*, 1667, M. 16166.

(d) See the chapter on the beneficiary's right of action, and defences competent. As to the nature of the legatee's right, the liability of the estate for interest, etc., see the chapter on legacies.

(e) *Thorburn v. Thorburn*, 18 Mar. 1858, 20 D. 829. See *Burnett v. Burnett*, 4 Mar. 1854, 16 D. 780.

(f) *Bowie v. Bowie*, 16 Jan. 1811, Hume, 765.

(g) *Hamilton v. Bennett*, 16 Aug. 1833, 6 W. & S. 533, affg. 10 S. 330; *Fergus v. Fergus*, 7 Feb. 1833, 11 S. 362; *Dennistoun v. Dennistoun*, 12 Dec. 1821, 1 S. 206; *Drummond v. Drummond*, 1624, M. 2261, 13900.

claimed beyond the value of the fund. Specific provisions of heritage (*a*) and special legacies (*b*), on the other hand, are not subject to abatement in consequence of any deficiency in the fund provided for general legacies. Annuities having a *tractum futuri temporis* are payable out of heritable estate (*c*).

Mode of estimating Life-rent Interests.

A liferent of residue, or of a special subject burdened with legacies, etc., necessarily implies that the value of the burdens is to be deducted, and that no more is to be paid to the liferenter than the actual produce of the surplus (*d*); but if the liferent of a fixed sum (as L.5000) is made payable out of a special fund, the trustees are at liberty to encroach upon the capital, if necessary, to make up a sum equal to the interest of L.5000 (*e*).

II. *What Funds are liable for Payment of Debts.*

General Rule as between Heritable and Moveable Estate.

Trustees and executors, although liable as the general representatives of the settlor in payment of all his debts, heritable and moveable, must, in the distribution of the estate, take care that the debts paid by them are made chargeable against those portions of the estate which in law or by convention are burdened with them. The general rule is, that unsecured debts, including personal obligations and guarantees (*f*), are chargeable in the first instance upon the executry estate, and heritable debts upon heritage, unless a contrary intention has been manifested (*g*); but in the application of this principle many refinements have been introduced and sanctioned by decision.

Residuary Interest in total Estate is Personalty.

The residuary interest under a general conveyance of heritable and moveable estate is primarily liable for the payment of all unsecured debts. However, if a settlor charge his heritable property with legacies, and appoint the residue of his personal estate to be divided

(*a*) *Breadalbane Trs. v. Duke of Buckingham*, 26 May 1842, 4 D. 1259 (first point).

(*b*) *Hill v. Hunter*, 14 May 1818, F. C.; see *Graham v. Graham*, 31 May 1834, 12 S. 665.

(*c*) *Wallace v. Ritchie's Tr.*, 7 July 1846, 8 D. 1038.

(*d*) *Casamaijor v. Pearson*, 29 April 1841, 2 Rob. 217; *Waddell v. Waddell*, 9 Mar. 1818, 6 Dow, 279. *Currie v. Threshie*, 4 July 1846, 8 D. 1021.

(*e*) *Miller's Trs. v. Miller*, 23 Feb. 1848, 10 D. 765; *Berry's Trs. v. Cox's Trs.*, 18 June 1850, 12 D. 1037.

(*f*) As to which, see *British Linen Co. v. Monteath*, 12 Feb. 1858, 20 D. 557.

(*g*) *Anderson v. Wauchope*, 1662, M. 14879; *Lord Lindsay v. Lord Pitmilley*, 1606, M. 15928; *Henderson v. Hamilton*, 28 Jan. 1858, 20 D. 473; *Thorburn v. Thorburn*, *infra*; and see *Steuart v. Barclay*, 1703, M. 2287.

rateably amongst the legatees, it is plainly implied that the heir of the heritable provision is to pay the legacies without relief (a). It is obvious that a personal debt cannot be made heritable *in lecto* through the medium of a *mortis causa* settlement imposing payment as a burden upon the heir (b); though, if the heir has been already excluded by a deed executed *in liege poustie*, the disponee may be burdened by testament (c). On the other hand, there seems no reason why the quality of a debt may not be changed upon death-bed, by means of an onerous transaction with the creditor; that is, by giving the creditor heritable security for it.

In the category of debts not heritably secured we may, however, include the value of debts which had been secured upon heritable property before it was acquired by the defunct, and which, although not actually discharged, have been allowed for in the settlement for the price, on the footing that they were to be paid off (d). And it would seem that a premonition to the heritable creditor, intimating that the debt would be paid off in six months, is, in a question of succession, sufficient to change the character of the debt from heritable to moveable (e). And the price of an heritable estate, which has been purchased, but not paid for, is, in the general case, a burden upon the executry estate, because it is presumed that the purchaser had intended to pay for it out of his moveable funds (f). But where the title to heritable property has been taken in the name of a party advancing a part of the price, subject to an obligation to reconvey, or account for the price on being relieved of his engagement, the Courts have considered that as the real nature of the transaction was the creation of an heritable security in the form of an *ex facie* absolute disposition, the heir taking the estate was the party to whom the obligation should transmit (g). And where part of the price has been secured by a bond

When Heritable Debts are chargeable on Personality.

(a) *Thorburn v. Thorburn*, 18 Mar. 1858, 20 D. 829.

(b) *Govan v. Seton*, 28 Jan. 1812, F. C.

(c) *Davidson v. Nairns*, 1755, 5 Br. Sup. 289. See p. 63, *supra*.

(d) *Arbuthnott v. Arbuthnott*, 1773, M. 5225; *M'Nicol v. M'Nicol*, 16 June 1814, F. C.; but see *Carrick's Trs. v. Moore*, 11 June 1840, 2 D. 1068.

(e) *Arbuthnott v. Arbuthnott*, *supra*; *Elliot v. Lord Minto*, 29 June 1825, 1 W. & S. 678, affg. 2 S. 180.

(f) See opinions in *Murray v. Murray*, 21 Dec. 1837, 16 S. 283; and *Clayton v. Lothian*, 3 Mar. 1826, 2 W. & S. 50, per Lord Gifford.

(g) *Murray v. Murray*, *supra*.

of corroboration (a), or made a real burden on the lands (b), the sum so secured is of course an heritable debt. Debts due in respect of the occupation of heritable subjects ought on principle to affect the heir; but the rent due for the current term for a house and grounds occupied as a residence has been held an executry debt, because the heir was not benefited by the occupation; and the same rule has been applied to the case of a farm lease, which had been taken up by the defunct with a view to realize payment of a moveable debt due by the proper lessee (c).

Power to charge does not alter liability.

A mere power to bind heirs of entail in payment of debts primarily affecting the executry estate, although conferred by statute, does not invert the order of liability at common law (d).

Liability *secundo loco*.

It is scarcely necessary to add, that in the event of the settlor's heritable or moveable estate proving insufficient for the payment of the debts properly chargeable against these estates respectively, the debt will be a good charge against the remaining portion of the succession (e).

Where Debt secured on different subjects.

With regard to the order of liability of the beneficiaries under destinations of heritable property or mixed succession, the intention of the testator must furnish the rule of liability (f); but if no distinct intention to burden any subject has been expressed, or if the debt has been secured on different subjects, the beneficiaries are liable *pro rata* of the value (g). Where the debt is made a burden on a certain subject, the beneficiary must take the subject *cum onere*, whether in a question with heirs (h) or general representatives (i).

(a) *Clayton v. Lothian*, 3 Mar. 1826, 2 W. & S. 40, affg. 3 S. 271.

(b) *M'Nicol v. M'Nicol*, 31 Jan. 1816, F. C.; *Mead v. Anderson*, 16 Nov. 1830, 4 W. & S. 328, affg. 6 S. 1034.

(c) *Cranstoun v. Scott*, 4 Mar. 1814, Hume, 192; *Waddell v. Waddell*, 9 Mar. 1818, 6 Dow, 279.

(d) *Breadalbane Trs. v. M. of Breadalbane*, 7 July 1846, 8 D. 1062.

(e) See remarks of Lord Fullerton in *Renton v. Renton*, 14 Nov. 1851, 14 D. 35. The fact that the debt was contracted in England (where the heir would not be liable) makes no difference in the liability of an heir of Scotch

heritable estate; *Fullarton v. Kinloch*, 1739; Elch. Succession, No. 6, M. 4456; 1 Paton, 265. See also *Burnett v. Burnett*, 4 Mar. 1854, 16 D. 780.

(f) *Ersk.* 3, 8, 52; *Stair*, 3, 5, 17; *Elliot v. Earl of Minto*, 7 July 1829, 6 W. & S. 381.

(g) *Sinclair's Exrs. v. Fraser*, 14 Feb. 1798, Hume, 176; *Moncrieff v. Skene*, 29 June 1825, 1 W. & S. 672.

(h) *Ogilvie v. Dundas*, 22 May 1826, 2 W. & S. 214; *Robertson's Crs. v. W. Robertson's Crs.*, 1803, M. "Competition" No. 2.

(i) *Carrick's Trs. v. More*, 11 June 1840, 2 D. 1068, and cases there cited.

The law has been so fixed in the most recent case, where the burden was antecedent in date to the provision (a); but as to subsequent burdens, the better opinion is that a general direction to trustees to pay the truster's debts, entitles the beneficiary to relief out of the general estate (b). A heritable debt is not made personal by the accident of the executor succeeding to the heritable estate (c).

In *Massie's Trs. v. Massie* (d), an heir of entail had executed a trust disposition of his life interest in the trust estate, with an assignation of rents in the usual terms, for the purpose of applying the free produce in payment of certain debts then due by the truster, including a bill debt of L.516, which was not extinguished at the termination of the liferent. In a competition as to the liability for this sum, the Court found, altering their first interlocutor, that the debt was a burden on the executry.

Debts secured on rents.

With respect to the order of liability of heirs in heritage, the rule is, that a general disponee is liable in the first instance (e), and after him the heir of line, for all heritable debts not specially charged upon other heirs, and that they are bound to relieve the executor (f). Creditors taking proceedings against heirs must observe the rules of discussion, calling in the first place the heir of line (g), then the heirs of conquest and provision (h). Decree must be obtained and personal diligence used before the trustee can proceed against the other co-obligants. The acceptance of a bond of corroboration from the heir-at-law does not necessarily liberate the personal representatives from their contingent liability (i).

Order of liability amongst Heirs.

An heir or disponee paying a moveable debt, or an executor paying a heritable debt, has of course a right of relief against the

Right of Relief.

(a) *Henderson v. Hamilton*, 29 Jan. 1858, 20 D. 479.

(b) See *Breadalbane Trs. v. D. of Buckingham*, 26 May 1842, 4 D. 1259, 1263.

(c) *Fraser v. Lovat*, 22 Feb. 1854, 16 D. 645.

(d) *Massie's Trs. v. Massie*, 6 June 1816, Hume, 193.

(e) *Parkhill v. Weir*, 1738, M. 5857; *Mercer v. Scotland*, 1745, M. 9786; Elch. Imp. Will, No. 4.

(f) *Kinloch v. Kinloch's Exrs.*, 25 Jan. 1811, Hume, 178; *Innes*, 1773, M. 3567.

(g) *Crs. of Fairly v. His Heirs*, 1630, M. 3559; *Dundas v. Ogilvie*, 1804, M. App. Discussion, No. 1.

(h) *Brown v. Brown*, 1782, M. 5228; *Forrester v. Fotheringhame*, 1649, 1 Br. Sup. 429; *Innes & Ors. v. Sinclair*, 1773, M. 3567.

(i) *Stuart v. Campbell*, 6 Feb. 1852, 14 D. 443.

person who is primarily liable (*a*); and it is immaterial to the question of relief, whether the payment has been made by the beneficiary himself or by the trustees in whom the property may happen to be vested. The grantee under a provision secured on heritage is not entitled to insist that the truster's debts should be paid in the first instance out of the executry funds, where these are insufficient for the payment of debts and legacies (*b*). Nor is it a good defence to an action by an executor claiming relief from the heir to the extent of the deficiency, that such deficiency was caused by the expense of proceedings to determine the question whether certain debts were chargeable against the heir or executor, the proceedings having been taken *bona fide* (*c*).

SECTION IV.

OF INVESTMENTS (*d*).

Where, by the purposes of the trust, the distribution of the fund is postponed to a distant day, it is incumbent on the trustee to invest it on proper security for the interests of all concerned.

Investment on
Personal Security
inadmissible.

The leading consideration which the trustee ought to keep in view in the selection of an investment, is the safety, rather than the productiveness, of the security. Accordingly, it has long been a settled rule of administration, that a trustee cannot lend on personal security (*e*), such as bills, notes (*f*), or personal bonds (*g*); for, as Lord Hardwicke pertinently observed, "a promissory note is evidence of a debt, but no security for it" (*h*). The entrusting of trust funds

(*a*) See Bell's Pr., 4th Ed. § 1936, and cases there cited.

(*b*) *Bain v. Reeves*, 22 Jan. 1861, 23 D. 416; *Moncrieff v. Miln*, 16 July 1856, 18 D. 1286.

(*c*) *Renton v. Renton*, 14 Nov. 1851, 14 D. 35.

(*d*) In a subsequent chapter, on the Liabilities of Trustees, we have endeavoured to summarize such of the leading English cases on the subject of legal investments as appear to be founded on principles recognized in our own

law, to which accordingly we refer our readers.

(*e*) See *Anderson v. Small*, 12 Feb. 1833, 11 S. 382; *Watson v. Crawcour*, 9 June 1843, 5 D. 1182.

(*f*) *Blain v. Paterson*, 28 Jan. 1836, 14 S. 361; *Ross v. Allan's Trs.*, 13 Nov. 1850, 13 D. 44.

(*g*) *Moffat v. Robertson*, 31 Jan. 1834, 12 S. 369.

(*h*) *Walker v. Symonds*, 3 Sw. 81, Note.

to a factor, co-trustee, or beneficiary, on his own acknowledgment is, if possible, more indefensible than a loan to a stranger. In either case, the trustee will be liable for all loss, including interest, resulting from the insolvency of the debtor (*a*). In a recent case (*b*), where trustees who were law agents had uplifted a portion of the trust funds, and applied them as a temporary accommodation to one of their clients to enable him to defray the expense of carrying on a litigation, an application was made to the Court for their removal, and although the ground of complaint was obviated by the resignation of the trustees, they were found liable in the expenses of the application, on the ground that it had been occasioned by their own impropriety. In another case, the trustees of a contract of marriage, who were empowered to lend on personal security, having lent the trust-money to the husband on his acceptance, were held liable, after the husband's bankruptcy, to replace the amount (*c*).

Trustees ought not to invest in the stock of railway, banking, or other companies; for it is impossible to draw any well-founded distinction, with reference to the propriety of the investment, between a joint stock company and an ordinary partnership. In point of law, an investment in shares is an investment in trade, and therefore a speculative transaction; and the history of many of the largest, and, apparently, most prosperous joint-stock companies, proves that the liability to loss, not to mention the fluctuating and precarious character of the profits of these concerns, is as great as in the case of a private trading company. In England the rule which prohibits the investment of trust funds in trade has been so strictly construed, that until the alteration introduced by a recent statute (*d*), trustees were not even permitted to invest in the stock of the Bank of England (*e*), or the East India or South Sea Companies (*f*); and were liable in payment of the difference between

Investments
in Shares or
Stock.

(*a*) *Ersk.* 3, 3, 34; and see *Sym v. Charles' Trs.*, 13 May 1830, 8 S. 741; *Grieve v. Amos's Exrs.*, 24 June 1835, 13 S. 973. See *Murray v. Borthwick's Trs.*, 1797, M. 3237, and cases referred to in the last section.

(*b*) *Hay v. Binny*, 10 Jan. 1861, 23 D. 594. See 5 Journ. of Jur. 92.

(*c*) *Ross v. Allan's Trs.*, *supra*.

(*d*) 22 & 23 Vict. cap. 35, § 32.

(*e*) *Hynes v. Redington*, 1 Jones & Lat. 589; *Howe v. Earl of Dartmouth*, 7 Ves. 150.

(*f*) *Trafford v. Boehm*, 3 Atk. 440; see 444.

the depreciation of such stock and that of the public funds during the same period. Although there is a paucity of authority in the law of Scotland with reference to the liability which trustees incur to the beneficiary by investing in shares, the prevailing opinion is, that the question is ruled by the decisions relative to investments in trade, affirmative of the English doctrine of liability.

*Acc. of Court
v. Baird.*

The judgment of the First Division in the case of the *Accountant of Court v. Baird* (a) throws little light on the question of liability, though there was an evident leaning towards the opinion that trustees would be personally liable for investments in shares effected by themselves. But the question before the Court was, whether the tutor-at-law was bound to make immediate consignment of the value of shares of a bankrupt company in which the defunct had invested, the ground of the alleged liability being the trustees' negligence in not immediately selling out. The Court held that this was a discretionary duty depending upon circumstances, which in this case were not ascertained. "But," said Lord Deas, "it is a very different question, and turns on very different grounds, whether the tutor is liable for allowing such investments made by the deceased to remain unchanged, and whether he would be liable had he made them himself. In the latter case, the presumption would be against him" (b). In a previous case, the Court had refused to approve of the accounts of a judicial factor who had invested in railway debentures, a much safer security than stock; and in a subsequent petition, setting forth that the funds had now been invested in heritable security, they refused to allow the factor to take credit for the expenses of the first application (c).

*Trustee investing Trust
Money in
Trade, an-
swerable for
Profits.*

If a trustee invests the money of his constituent in trade, either by lending it on interest or for a share of the profits, there can be no doubt that he is liable as for a breach of trust; and the liability seems to be equally clear, where the money is merely left in the business in which the settlor had placed it, unless the trustee has been specially authorized to continue the investment. We are assuming here that the money is left as a permanent investment;

(a) *Account. of Court v. Baird*, 29 June 1858, 20 D. 1176.

(b) 20 D. 1184.

(c) *Pet. Morrison*, 5 Dec. 1856, 19

D. 132, reported in the first stage as A. B., Petitioner, 29 June 1854, 16 D. 1004.

for we have seen, in considering the subject of realization, that the trustee will not be responsible for loss in consequence of an unexpected failure prior to the time at which he might be reasonably expected to have informed himself as to the state of the truster's funds, and taken measures for reducing them into possession. If the trustees are themselves personally interested in the concern in which the funds have been allowed to remain, they will be liable not only in the event of loss, but also for a share of the profits of the business (*a*), in the ratio of the proportion which the trust funds bear to the other capital embarked in the business (*b*). In *Guthrie v. Fairweather* (*c*), some doubts were expressed as to whether a factor, who had merely left the trust money as he found it in a business in which he was a partner, was liable for more than 5 per cent. interest; but it has since been decided by concurring judgments of both Divisions, that the beneficiary, although not liable as a partner, is entitled to profits, not only on the principle of constructive trust (*d*), but as a penalty upon the trustee for diverting the trust funds into an improper channel (*e*).

It appears, however, from the sequel of the case of *Laird v. Laird* (*f*), that the trustee will not be liable to refund profits paid to other partners in the concern who are not trustees; for their relation to the beneficiary is merely that of debtor to creditor; nor will trustees who do not participate in the business be held accountable for such profits as are due, unless they have been guilty of neglect in calling their co-trustee to account, though they will be liable in the event of a loss (*g*). "A trustee," said Lord Pr. McNeill (*h*), "cannot justifiably embark the trust funds in trade, even though he be not expressly prohibited by the trust deed, and though he may intend the benefit to accrue to the beneficiaries. If, therefore, he does so—if he does what by law he was not entitled to do, and the funds are in consequence lost, he must bear the loss; but

Trustee not liable to account for Profits paid to Co-partners;

but will be liable for all Losses.

(*a*) *Laird v. Laird*, 26 June 1855, 17 D. 984; *Cochrane v. Black*, 1 Feb. 1855, 17 D. 321.

(*b*) See *Cochrane v. Black*, 16 July 1857, 19 D. 1019.

(*c*) *Guthrie v. Fairweather*, 16 Dec. 1853, 16 D. 214.

(*d*) See *ante*, Chapter XI. (Constructive Trusts.)

(*e*) *Laird v. Laird*, 26 June 1855, 17 D. 984; see 993; *Cochrane v. Black*, *supra*.

(*f*) *Laird v. Laird*, 28 May 1858, 20 D. 972.

(*g*) See also, on this point, *Graham v. Keble*, 10 Nov. 1813, 2 Dow, 17.

(*h*) 20 D. 980.

if there is any gain, the gain will belong, not to the trustee, but to the beneficiary whose funds were so employed. It cannot be doubted that he must replace them if lost, as his proceedings were unauthorized by law. I think it not less clear that he cannot make gain to himself by using, for his own behalf, the funds of the trust committed to his care. The law will even presume that the trustee intended that the profits should go to the beneficiary, rather than presume that he intended his own aggrandisement at the risk or expense of the beneficiary."

Co-Trustees
not in the
Business liable
for Losses.

With regard to the liability of co-trustees not in business, his Lordship observed, that though they had made no profits themselves, and were not in the circumstances liable for those which fell to the share of their colleague, they might be liable for letting funds lie at a risk, and would be bound to make up any loss thence arising, with interest (a). And the opinion of Lord Deas was to the same effect.

Directors not
entitled to
invest in
Shares of an-
other Com-
pany.

It has been settled that the directors of an incorporated company cannot lawfully invest their funds in the purchase of shares in another company, not only because the powers of the directors are limited by the charter or act of incorporation, but also on the principle that the directors are trustees for the shareholders, who are entitled to trust to the security afforded by their appointment that the funds will not be appropriated to other purposes than those contemplated in the constitution of the company (b).

Investments of
a wasting na-
ture not to be
continued.

In the administration of English trusts by the Court of Chancery the rule has been laid down, that if a testator give the residue of his personal estate (c) or the interest of his property (d) to several persons in succession, and the subject of the bequest is of a "wasting" nature, as leaseholds, annuities, etc., it will be the duty of the trustees to realize and thereafter to invest the proceeds in the funds, in order that the estate may assume a permanent form, and so be capable of succession. But the intention to convert,

(a) 20 D. 982.

(b) *Balfour's Trs. v. Edinr. & Northern Raily. Co.*, 8 June 1848, 10 D. 1240; *Caledonian, etc., Raily. Co. v. Mags. of Helensburgh*, 19 June 1856, 2 Macq. 391. See p. 405, where an opinion to this effect is expressed by the Lord Chancellor.

(c) *Howe v. E. of Dartmouth*, 7 Ves.

137, and cases there cited; *Lichfield v. Baker*, 2 Beav. 481; *Crawley v. Crawley*, 7 Sim. 427; *Sutherland v. Cooke*, 1 Coll. 498; *Johnson v. Johnson*, 2 Coll. 441.

(d) *Fearn v. Young*, 9 Ves. 549; *Burn v. Dixon*, 10 Sim. 636; *House v. Way*, 12 Jur. 959; *Oakes v. Strachey*, 13 Sim. 414.

which is the foundation of the duty referred to, may be overcome by expressions indicating that the subject should be enjoyed specifically (a). The doctrine of constructive conversion, in its application to interests of a fugitive character, does not appear to have occurred for consideration in any native case; but the principle of the English decisions is agreeable to equity, and would probably be adopted by our Courts (b).

The proper channel of investment for trust money, is either the stock of the consolidated fund, or first class heritable security (c). If to a legacy is attached a direction to invest the amount in Government securities, the trustees will be bound to purchase a quantity of stock equal to what the legacy would have purchased at the death of the testator, notwithstanding that a change in the value of the public securities may have occurred before the trustees were in a position to make the investment (d).

A preference formerly given by the Court of Chancery to one particular class of Government securities appears to Scotch lawyers to savour somewhat of pedantry. By a recent Act of Parliament, Government securities of every description, as well as other stocks of a *quasi* public nature, have been declared eligible investments. The distinctions here referred to have never been recognised in Scotland, and do not seem to call for particular notice.

With regard to heritable securities, it is to be observed in the first place, that trustees will be bound by any limitation imposed by the terms of the trust. And therefore, where trustees were directed "to lay out a sufficient sum in good security," for the purpose of providing a life annuity of L.40 a year to the testator's widow, the capital to go to the children, it was held that the widow was not bound to accept a bond of annuity heritably secured, but was entitled to insist that a capital sum yielding L.40 of annual interest should be set apart for her benefit (e).

(a) *Vincent v. Newcombe*, Youngs, 599; *Lord v. Godfrey*, 4 Mad. 455. See Lewin, Tr., 4th Ed. 227.

(b) The doctrine, however, would not be extended to wasting interests in land. See *Muirhead v. Young's Trs.*, 13 Feb. 1858, 20 D. 592.

(c) *Pet. Haldane*, 23 Dec. 1848, 11 D. 286; *Pet. Lindsay*, *id.* page; *Ac-*

count. of Court v. Geddes, 29 June 1858, 20 D. 1174.

(d) *Horsbrugh v. Horsbrugh*, 1 Mar. 1848, 10 D. 824. See *Pollexfen v. Stuart*, 14 July 1841, 8 D. 1215; *Pet. Gov. of Cauvin's Hospital*, 29 Jan. 1842, 4 D. 557.

(e) *Wilson v. Beveridge*, 31 Jan. 1833, 11 S. 343. The Courts in Eng-

Funds or Heritable Security, the only legal investments.

Rule of the Court of Chancery.

Trustees may follow special direction as to Investment.

House Property.

House property, according to Lord St Leonards, is not a satisfactory investment; because it is liable to depreciation and to destruction by fire (a). His Lordship's remark was made, possibly in forgetfulness of, certainly without direct reference to the rule respecting investments, which distinguishes the Scotch law from that of England; namely, that heritable security is the authorized channel for the investment of trust money. In practice, trustees will be advised that they may lend upon the security of first class urban subjects with perfect safety and propriety.

Postponed Securities.

Trustees ought on no account to invest on postponed heritable securities. It has indeed been ruled that the existence of a preferable bond over the property is not of itself sufficient to fasten personal liability upon the investing trustee, especially if a collateral security is taken (b). However, in the case of the *Accountant of Court v. Forsyth* (c), a *curator bonis* was obliged to refund a sum of L.2000, which was lost in consequence of having been lent on a postponed bond and disposition in security, although he had taken the precaution of obtaining a valuation from a respectable builder, who certified that the property was worth upwards of L.6600, leaving a margin of L.2300, after deducting incumbrances, being more than a third of the estimated value. The Court seem to have proceeded upon the view that the factor ought to have known that the valuation was for a fancy price, as the property consisted chiefly of a villa and pleasure-grounds, and could not be turned to profitable account. We have already had occasion to observe, and now repeat, that it is not enough for the trustees to give directions for the suitable investment of the trust funds. It is their duty to see that the money is actually invested (d).

Duties of Trustees for Execution.

It is a frequent provision in ante-nuptial marriage-contracts and family settlements intended to take effect *inter vivos*, that the trustees therein appointed shall be entitled to enforce the obligations of the parties by execution. The duties of trustees for execution

land have also disapproved of securing annuities by way of purchase; *Fitzgerald v. Pringle*, 2 Moll. 534.

(a) Per Lord St Leonards in *Thomson v. Christie*, 1 M'Q. 238; *Train v. Bell's Trs.*, 26 May 1824, 3 S. 68.

(b) *Graham v. Hunter's Trs.*, 4 Mar.

1831, 9 S. 543. But see *contra*, *Thomson v. Christie*, *supra*.

(c) *Account. of Court v. Forsyth*, 28 Jan. 1853, 15 D. 345; see *Murray v. Murray*, 30 May 1833, 11 S. 663.

(d) *Mayne v. M'Keand*, 4 June 1835, 13 S. 870; *Greive v. Amos's Exrs.*, 24

are of a very delicate nature; and the Court will not exact the same degree of diligence from trustees who are merely charged with a general protection of the interests created by marriage settlements, that would be necessary and incumbent upon the trustees in relation to the management of property of which they are actually let into the possession (a). The cases of *Stark* (b), and *Muir v. Mackersy* (c), may be consulted on the subject of the obligations of trustees for execution. In the latter case, a policy of insurance had been effected, in pursuance of an obligation to that effect in the ante-nuptial contract of the insurer, but was surrendered in consequence of the marriage having been dissolved without issue surviving. The trustee thereupon charged the holder, a lady, to take out a new policy; but the Court did not give much encouragement to this proceeding, and allowed the note of suspension to pass without caution or consignment.

If trustees are expressly authorized to invest on personal security, it has been said they may lend on personal bond, and will not be liable on the bankruptcy of the debtor, if he were believed to be of good credit at the time of entering into the transaction (d). We doubt the soundness of this opinion. Personal security, we think, means the security of personal property; and not of a personal obligation, such as a bond or bill (e). It would seem that trustees empowered to lend on personal security are not liable for loss upon a postponed heritable bond, fortified by collateral security in the shape of a policy of insurance (f). But they may not lend on the life interest of an heir of entail similarly secured (g).

It would seem that a legacy to minor children, when no provision is made for a continuing trust, may be paid over to the father as administrator-in-law; but if the trustees have reason to believe

Effect of express authority to invest on Personal Security.

When Trustees for a Minor ought to pay to Curator or Administrator-in-law.

June 1835, 13 S. 973; *Blain v. Paterson*, 28 Jan. 1836, 14 S. 361.

(a) In *Ross v. Allan's Trs.*, 19 Nov. 1850, 13 D. 44, marriage-contract trustees were found liable to the wife in repayment of funds which they had improperly advanced to the husband. See *Osburn v. Osburn*, 1714, M. 16195.

(b) *Stark v. Moncreiff*, 7 June 1838, 16 S. 1114; *Hamilton v. Bruce's Trs.*, 20 May 1857, 19 D. 745.

(c) 21 Dec. 1853, 16 D. 289.

(d) Per Lord Moncreiff in *Seton v. Dawson*, 4 D. 328.

(e) *Ross v. Allan's Trs.*, *supra*; *Langston v. Ollivant*, G. Coop. 83; *Ross v. Godsall*, 1 Y. & C. Ch. Cas. 617.

(f) *Graham v. Hunter's Trs.*, 4 Mar. 1831, 9 S. 543.

(g) *Bon-Accord Ins. Co. v. Souter's Trs.*, 11 Dec. 1850, 13 D. 295.

that he is in embarrassed circumstances, they ought to exact caution. Where this precaution was taken, the Court refused to enforce a claim for repetition at the instance of the minor beneficiary (a). If, on the other hand, the trustees are required to invest the sum, for behoof of one party in life and another in fee, in terms which vest an immediate interest in the beneficiaries, they sufficiently discharge their duty by investing the fund on good heritable security in the name of the parties for their respective interests, and are not bound to become parties to any inquiry as to the subsequent disposal of the fund (b).

Investment
pendente lite.

Pending the issue of a litigation as to the disposal of trust property, trustees are not necessarily bound to invest; nor will they be liable in penal interest for neglecting to do so, if they have acted in good faith (c).

Measure of
Damages for
Loss through
unsafe Invest-
ment.

With regard to the measure of damages for insecure investments resulting in total loss, the rule in England is, that *cestuis que trust* may elect to charge the trustees with the amount of the money, or with the amount of Three per Cent. consols which they might have purchased with the money, unless where they have been authorized to invest either in Government or *real securities*, in which case the trustees are answerable only for the principal money and interest (d). And it was decided in a Scotch case, involving property to a considerable amount, that trustees were liable, in consequence of refusing to invest in the funds upon the requisition of all the beneficiaries, to pay a sum equal to what would have been gained in consequence of the rise of stocks in the interval (e). And on the same principle, where a trustee had been directed to secure a legacy of L.500 by investment in American stocks, and the money was lost in consequence of the trustee having allowed the money to remain in the hands of the factor, who died insolvent, the Court found that the

(a) *Stevenson's Trs. v. Dumbreck*, 11 Feb. 1861, 4 M.Q. 86, affg. 19 D. 462; *Govan v. Richardson*, 1638, M. 16263; and see *Wilkie*, 1688, M. 16311; *Graham v. Duff*, 1794, M. 16383; *Johnstone v. Wilson*, 11 July 1822, 1 S. 596. But trustees of a continuing trust are not bound to pay to a guardian (*Moncrieff v. Usher*, 15 Nov. 1861, 24 D. 49).

(b) *Graham v. Kilgour*, 5 Mar. 1829, 7 S. 543.

(c) *Fortune's Trs. v. Gillies*, 16 Nov. 1839, 2 D. 59.

(d) *Robinson v. Robinson*, 1 De G. M. & G. 256; *Lewin, Tr.*, 4th Ed. 249.

(e) *Morrison v. Miller*, 9 Feb. 1827, 5 S. 322.

trustee was bound to purchase such sum of American stock as might have been purchased for L.500 sterling within a reasonable time after the death of the testatrix; and also to pay to the pursuer a sum equal to the interests or dividend that would have accrued in time past upon the stock, in case the same had been duly purchased (a). But the value of the fund itself, with the addition of legal interest, has been more usually taken as the measure of damages (b).

In many settlements the powers of investment are very inaccurately expressed. In practice, it is not unusual to find a general discretionary power given to trustees; or a power to invest on heritable security, and "on such other securities as the trustees shall think proper;" the intention being obviously to extend the powers of the trustees in the matter of investment. It is, however, very doubtful whether the words we have quoted are capable of receiving such a construction. We incline to think that a general reference of the duty of investment to the trustees' discretion, must mean a discretion to be exercised according to the rules of law; and that securities which the trustees shall think proper, must be restricted to the class of securities which the Court would approve, that is, to investments in the funds, or on heritable security (c). To warrant the investment of the trust funds on securities of a different character, the authority must, in our opinion, be *express*.

Construction of
Discretionary
Powers of In-
vestment.

In practice, it is desirable to insert in settlements of personal property a power to invest in the purchase of guaranteed shares in incorporated companies, or to lend to such companies upon debenture, or to lend upon the security of guaranteed shares. These form quite as good securities as land, as is proved by the low rate of interest which they bear; they are more easily obtained, and generally more easily realized. In the case of trusts intended to endure for a considerable time, a power to purchase property ought also to be given. Where the trustees have the confidence of the settlor, it is desirable to make their powers as to investment very ample.

Practical Sug-
gestions.

(a) *Sym v. Charles*, 13 May 1830, 8 S. 743. *v. Paterson*, 28 Jan. 1836, 14 S. 374; *Wellwood v. Ross*, 23 June 1831, 9 S.

(b) *Pollexfen v. Stewart*, 14 July 1841, 3 D. 1215, 1234; *Seton v. Dawson*, 18 Dec. 1841, 4 D. 313; *Anderson v.* 790; *Gray v. Gray*, 4 June 1835, 13 S. 866.

(c) See *Styles v. Guy*, narrated *supra*, p. 311, note. *Small*, 12 Feb. 1833, 11 S. 382; *Blain*

CHAPTER XVII.

OF THE DUTIES OF TRUSTEES UNDER TRUSTS FOR SALE.

THE subject of trusts for sale may be divided into three sections :—
First, the general duties of trustees for sale; *secondly*, the title which a purchaser may claim from the trustees; and *thirdly*, the disability of trustees to become purchasers of the trust property.

SECTION I.

OF THE EXECUTION OF A PURPOSE OF SALE.

Constitution.

In another chapter (*a*) we have discussed the subject of the constitution of powers of sale. These, when intended for the benefit of the donee of the power, *e. g.*, in the case of powers of sale in heritable securities, must be constituted by express grant. But in the case of a disposition in trust, a power of sale may be raised by implication, on the principle that all powers necessary for the due accomplishment of the purposes of the trust are comprehended in the conveyance.

Moveable
Property.

As to sales of moveable property under trusts, it does not appear to be necessary that any express power should be granted, the trustee being entitled to sell by private bargain, at his own discretion, for the purpose of investing the property of the trust upon suitable security. The disposal of moveable property under trust, even when brought under judicial management, is very much a matter of discretion, the direction of the Act of Sederunt 1730 (*b*) being, that the factor shall “manage or dispose of such moveables according to the

(*a*) Chap. XXI. Sect. III.

(*b*) Act of S. 13 Feb. 1730, Al. Ed. 61.

rules of law, and as prudence requires, for the benefit of the proprietor and all having interest" (a).

The Court, it is conceived, would not now entertain a petition at the instance of trustees for authority to sell, though, where a doubt exists as to whether such a power has been given by the settlor, it may be cleared up in a declarator (b). Judicial factors upon trust estates are not entitled to exercise powers of sale of heritable property at their own discretion; but authority is always granted on a special application, where the realization of the property is necessary for the execution of the purposes of the trust (c), or where it is necessary to save the estate from injury by diligence (d), or otherwise (e). For the better protection of the beneficiary's interest, the rule has been laid down, that sales of heritage under the authority of the Court must be by public roup (f). Curators, or guardians for minors, or persons under legal incapacity, will not be authorized to sell heritable estate, unless the sale is considered necessary for the purpose of providing for immediate maintenance (g), or to protect the estate from being carried off by diligence (h), or for the fulfilment of existing contracts (i).

Who may
exercise a
Discretionary
Trust for
Sale.

Bankruptcy (k) or sequestration (l) does not extinguish the powers of sale of heritable creditors; but if the heritable creditors defer the execution of such powers, the general creditors may, at a meeting called for the purpose, resolve that the trustee shall dispose of the heritable estate by public sale, or bring it to a judicial sale;

Exercise of
Power by a
Heritable Cre-
ditor;

(a) See *A. B.* 21 Dec. 1848, 21 Jur. 73; *Dalglish*, 13 Feb. 1849, 11 D. 1080; *Pet. Lindsay*, 10 Mar. 1849, 11 D. 1080. As to the authority of creditors, see *Wood v. Anstruther*, 6 D. 291, 4 D. 1363.

(b) See the analogous case of an application for power to borrow, *Kinloch*, 7 Dec. 1859, 22 D. 174. See also Chap. XXI. Sect. 8.

(c) See *Pet. Auld*, 5 Feb. 1856, 18 D. 487.

(d) *Fullarton*, 19 June 1834, 12 S. 750; *Ferguson*, 14 Jan. 1836, 14 S. 213; *Cleugh*, 17 July 1841, 3 D. 1261; *Arthur*, 30 June 1846, 8 D. 1211.

(e) *Muller v. Dixon*, 11 Feb. 1854, 16 D. 536.

(f) *Cases of Auld & Arthur, supra.*

(g) *Innes*, 17 July 1846, 8 D. 1211; *Howe*, 12 Feb. 1859, 19 D. 888; *Lindsay*, 17 Feb. 1857, 19 D. 455.

(h) *Pet. Dunbar*, 7 July 1847, 9 D. 1426; *Wood*, 16 Mar. 1856, 18 D. 732; and see the older cases of *Vere*, 1804, M. 16389; *Finlayson*, '22 Dec. 1810, F. C.

(i) *Crichton*, 18 Feb. 1857, 19 D. 429; *Hawkins*, 24 June 1848, 10 D. 1408; *Kirkland*, 6 June 1848, 10 D. 1242.

(k) *Dunlop v. Marshall*, 19 Jan. 1821, Hume, 666, F. C.

(l) 19 & 20 Vict. c. 79, § 112 & 113.

the upset price and the conditions of roup, in the former alternative, being determinable by the trustee, with the consent of the commissioners; or the trustee may, with concurrence of a majority of creditors in number and value, and of the heritable creditors, if any, and of the accountant, sell the estate by private bargain, on such terms as may be fixed, with concurrence of those parties (a). The institution of a ranking and sale (b), or a multiplepointing, does not operate as an interruption to a sale by a heritable creditor under a power; but it would seem that litigiousity is a sufficient ground for interpellating a trustee vested with a discretionary power from putting it in force; for, *pendente lite nihil innovandum* (c).

under Entail
Amendment
Act.

Sales of entailed property charged with debt, under the powers conferred by the 25th section of the 11 & 12 Vict. cap. 36 (d), must be carried through at the sight of the Court of Session, who are empowered to select such portions of the estate, other than the mansion-house, offices and policies, as they may consider most suitable to be sold for the purpose of paying off the debt, and to settle the terms of the conveyance and the price; it being declared that the purchaser shall have no interest, concern, or responsibility as to the application thereof. It has been held that the powers of sale given by the Entail Amendment Act, are applicable to the case of an entailed estate charged with debt under the authority of a private Act of Parliament containing provisions for clearing off the debt by instalments (e).

Trustees are
the judges as
to the neces-
sity for exe-
cuting Power.

It is impossible to lay down any rule as to the circumstances in which trustees will be justified in executing a discretionary power of sale; nor is it necessary to do so, since trustees holding a discretionary power are themselves the judges of the necessity of using it; and they will be protected in the exercise of their discre-

(a) 19 & 20 Vict. c. 79, § 114 & 115. See *Beveridge v. Wilson*, 17 Jan. 1829, 7 S. 279; *Kerr v. Wood*, 3 Mar. 1830, 8 S. 628; *Melville v. Paterson*, 1 June 1842, 4 D. 1311.

(b) *Simson v. Graham*, 25 Nov. 1831, 10 S. 66; *Bell v. Gordon*, 24 Feb. 1838, 16 S. 657; *Robertson v. Ferrier*, 12 Dec. 1833, 12 S. 203.

(c) See *Ersk.* 2, 12, 65; *Cheyne v.*

Cameron's Trs., 19 Jan. 1831, 9 S. 302.

(d) See also 38 Geo. III. cap. 60; as to which *Laurie v. Laurie*, 11 Feb. 1806, F. C., 2 Dow, 556; and *Malcolm v. Malcolm*, 4 Dec. 1821, 1 S. 183; *Baird v. Neill*, 12 June 1835, 13 S. 927.

(e) *Mackenzie v. Mackenzie*, 7 June 1849, 11 D. 1115; see *Meiklam v. Glassford*, 4 Dec. 1851, 14 D. 137.

tion if they act in good faith (a). It would seem that a power of sale may be exercised by a majority of the trustees, and does not require the consent of the entire body (b). And where one of two trustees, under a voluntary trust deed for payment of creditors, had attended the sale and made an offer for the property, which was not accepted, he was held barred from pleading, in an action against his co-trustee, that the sale had been invalidated in consequence of his having refused to interpose his consent to the transaction (c). In trusts to sell for behoof of creditors, the consent of the granter is sufficiently given by his subscription of the trust deed; and he will not be permitted to control the discretion of the trustee as to the terms of the sale (d), still less to stop the proceedings by intimating his intention to recal the trust, and to make other arrangements for payment (e). The beneficiary, as a rule, cannot stop the execution of a power (f); nor can a non-acceding creditor, who has neither attached the estate nor interpellated the trustees by diligence, prevent the trustee of the acceding creditors from putting the heritable estate up to auction (g). But any abuse of powers of sale by trustees or creditors may be restrained by the Court (h). On this principle, interdict has been granted to

(a) *Clelland v. Brodie*, 20 Nov. 1844, 7 D. 147; *Mitchell v. Mackinlay*, 9 Feb. 1842, 4 D. 634. When the power is *discretionary*, the purchaser cannot challenge the trustee's title. Thus, in a deed of trust for payment of debts, it was declared, that if for any reason whatever, in the opinion of the trustees, a sale should become necessary, they were authorized to sell. The purchaser objected that the amount of the incumbrances would not justify a sale of the entire estate; but the Vice-Chancellor Shadwell said,—“The general language of the testator has made it plain, that the power of sale depends upon the opinion of the trustees that a sale is necessary; and the fact that they did think it necessary will be proved by their executing the conveyance to the purchaser” (*Rendlesham v. Meux*, 16 Sim. 249, 257).

(b) *Fleming v. Campbell*, 25 June

1845, 7 D. 935; *Darling v. Adamson*, 24 Feb. 1837, 15 S. 672; but see *contra*, *Scott v. Reid*, 16 Feb. 1822, 1 S. 332. A power of sale may be exercised by *surviving* trustees, both at common law and under the Trustee Act, 1861 (*supra*, Chapter 12, p. 227).

(c) *Brisbane's Trs. v. Crawford*, 3 Feb. 1826, 4 S. 422.

(d) *Calder v. Gray*, 16 Dec. 1823, 2 S. 582.

(e) *Innes v. Innes*, 18 Dec. 1828, 7 S. 206.

(f) *Kelly v. Thomson*, 19 Dec. 1840, F. C.

(g) *Stubbs & Co. v. Smith*, 24 June 1829, 7 S. 790; *Kerr v. Graham's Trs.*, 17 Nov. 1827, 6 S. 73; 21 Dec. 1827, 6 S. 270.

(h) *Ross v. Equitable Loan Co.*, 23 Dec. 1826, 5 S. 192; *Moffat v. Calderhead*, 16 June 1825, 4 S. 96; *M'Dowal v. Milligan*, 17 Nov. 1825, 4 S. 182.

prevent an unnecessary sale of lands, where the property already disposed of had realized a sum sufficient to pay all debts (a); and, in another case, to prevent a sale being carried through by a preferable creditor at an insufficient upset price, to the injury of postponed creditors (b).

Trust may be executed by a Factor.

Trustees may grant a commission to a factor to carry through a sale, with power to convey; and the purchaser cannot object to this as a delegation, for the mandate is itself an execution of the trust (c). Where the factor has power to sell, but not to dispose, the trustees will be bound to grant a title or to pay damages (d).

Despatch.

Trustees expressly enjoined to sell must proceed with reasonable despatch, and not hang up the trust by bringing actions to ascertain the sufficiency of their title to the property (e).

Sales at the instance of Creditors must be by Public Roup.

In the powers of sale granted in heritable securities, it was usual to stipulate that the sale should be by public roup; and this condition has been made matter of style by the Heritable Securities Act, 1847 (f), which declares that a simple power of sale shall have the same effect and operation as a special provision to the effect that, on failure to repay the principal and interest within three months after a requisition (g), it should be lawful to the grantee to sell and dispose of the lands, in whole or in lots, by public roup at Edinburgh or Glasgow, or at the head burgh of the county, etc., on previous advertisement, stating the time and place of sale, and published once weekly for at least six weeks previous to the expiry of the said three months, etc. Apart from convention, the creditor is bound to give his debtor an opportunity of paying before advertising the property (h). On the construction of a private Act of Parliament, which authorized the sale of certain entailed lands under

Advertisements.

(a) *Pender v. Ferguson*, 17 Nov. 1831, 10 S. 19. See *Ord v. Noel*, 5 Mad. 440, and cases noted by Lewin (p. 415).

(b) *Kerr v. M'Arthur's Trs.*, 23 Dec. 1848, 11 D. 301; but see *Clelland v. Brodie*, *supra*.

(c) *Innes v. Reid's Trs.*, 22 June 1822, 1 S. 518; contrary to the English rule; see Lewin, Tr., 4th Ed. 301.

(d) *Thomas v. Walker's Trs.*, 4 July 1829, 7 S. 828; 4 Dec. 1832, 11 S. 162.

(e) *Darling v. Adamson*, 24 Feb. 1847, 15 S. 672; *Scott v. Thomson*, 6 Dec. 1854, 17 D. 124; *Ogilvie's Trs. v. Hamilton*, 10 Dec. 1833, 12 S. 189.

(f) 10 & 11 Vict. cap. 50, § 3.

(g) *Manson v. Miller*, 18 June 1818, Hume, 720.

(h) *Moffat v. Calderhead*, *supra*; *Hagart v. Robertson*, 20 Dec. 1834, 13 S. 234; *Reid v. Steele*, 21 Feb. 1852, 24 Jur. 266.

the usual conditions as to advertisements, etc., it was held that an adjournment for nine months, followed by a reduction in the upset price, must be regarded as a new exposure, requiring to be preceded by the same statutory advertisements as the first exposure. It was observed that the intervention of one of the legal terms of payment between the diets was enough to interrupt the proceedings (*a*). It would seem that a trustee who should proceed to sell without proper publication, might be interpellated by interdict at the instance of the beneficiary (*b*).

In sales of property under the authority of the Court, it is customary to fix the upset price upon a report by two valuers. Trustees would do well to follow the same course, and not to assume the responsibility of determining the price upon their own opinion of the value of the property. When it is remembered that by the law of Scotland the first party subscribing an offer for the upset price is entitled to a disposition of the estate, in the absence of any higher offerer, it will at once be seen that the determination of the upset price of property is a duty requiring the greatest circumspection (*c*). Trustees may be restrained by the Court of Session from carrying through a sale at a season when purchasers are not likely to come forward, or at such an upset price as involves a sacrifice of the rights of postponed creditors (*d*); who are entitled, if necessary for the protection of their interests, to tender payment of the preferable debt, and to demand an assignation to the security on payment of the debt so secured (*e*).

An example of the modern form of Articles of Roup, including stipulations as to adjournment, power of division into lots in

Valuation
and Upset
Price.

Form of
Articles of
Roup.

(*a*) *Pet. Melville & Dundas*, 27 Jan. 1854, 16 D. 419; and see *M'Gregor v. Stirling*, 28 Nov. 1832, 11 S. 138; *Hope v. Moncreiff's Tutor*, 26 Jan. 1833, 11 S. 324. But it is not incumbent on the exposor to give a new intimation to the debtor; *Glas v. Stewart*, 29 May 1830, 8 S. 843; *Young v. Dunn*, 1785, M. 14191.

(*b*) See cases cited, *supra*, p. 345-6. The Court of Chancery gives relief either by setting aside the sale, or by injunction to restrain trustees from selling upon insufficient notice

(Anon. case, 6 Mad. 10; *Blennerhasset v. Day*, 2 B. & B. 133; *Jenkins v. Jones*, 2 Giff. 99, 29 L. J. Ch. 403; but see *contra*, *Matthie v. Edwards*, 16 L. J. Ch. 405).

(*c*) See Sugd. Vend. and Purch., 11th Ed. 55.

(*d*) Bell's Com., 5th Ed., II. 292; per Lord Mackenzie in *Kerr v. M'Arthur's Trs.*, 23 Dec. 1848, 11 D. 302; and see *Wilson v. Stirling*, 14 Mar. 1843, 8 D. 1261.

(*e*) *Cunninghame's Trs. v. Hutton*, 18 Dec. 1847, 10 D. 307.

the event of no person appearing to make offer for the whole estate, and exclusion of warrandice as to the value and extent of the lands and burdens, etc. (a), will be found in the Appendix to this volume. It is not unusual to stipulate that the purchaser must refer questions as to the sufficiency of the title to arbitration (b); or that he is to satisfy himself as to the validity of the title before the sale (c),—a stipulation which is absolutely necessary for the protection of trustees who may have no funds out of which to defray the expense of litigation, other than the price of the estate itself. A creditor was held not entitled to insist that the title-deeds should be produced at the sale, where this could not be done without discharging a lien (d). On the other hand, if the exposor wishes to have the titles, he must discharge any security to which they are subject at his own expense (e).

How the Sale
is to be carried
through.

The sale must be conducted fairly. If the upset price has been honestly and intelligently fixed, the trustee has no excuse for buying in, and if he do, he exposes himself to actions of damages at the instance of any *bona fide* offerer; and also at the instance of the beneficiary, in the event of the estate being afterwards sold for less than the price at which it was withdrawn (f). A *bona fide* offerer of the upset price is entitled to reduction of all offers made by disqualified persons, or in the interest of the exposor, subsequent to his own first offer; and he may demand a conveyance in terms of it (g); though he is not himself bound, being liberated in con-

(a) As to which, see *Murray v. Selkraig*, 26 Jan. 1815, F. C.

(b) *Stewart v. Lang's Trs.*, 30 Nov. 1839, 2 D. 168; *Anderson v. Shaw*, 6 Mar. 1849, 11 D. 970.

(c) See *Young v. Grierson*, 19 July 1849, 11 D. 1482.

(d) *Grant v. Findlay*, 10 July 1845, 4 Bell, 361. But see *Clason v. Jones*, 17 July 1847, 9 D. 1512.

(e) *Dobie v. Scales*, 19 May 1831, 9 S. 609; *Malcolm v. Carmichael*, 9 Mar. 1854, 16 D. 825.

(f) *Taylor v. Tabrum*, 6 Sim. 281. Sir John Leach remarked, in *Ord v. Noel*, 5 Mad. 440, "If the sale be made with all the circumstances of caution which a provident owner would have

applied in the case of his own property, it could not be a breach of trust that the estate did not produce a full price; for the very nature of an auction was, that the adequacy of price should be submitted to the chance of competition." But he added, "If trustees, or those who act by their authority, fail in reasonable diligence—if they contract under circumstances of haste and improvidence—if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust, at the expense of another party, a court of equity will not enforce the specific performance of the contract."

(g) *Faulds v. Corbett*, 25 Feb. 1859,

sequence of the fraud practised upon him (*a*). When the time of exposure is limited, as was formerly the practice, by the running of a half-hour sand-glass, it is "the duty of the judge of the roup, by laying the sand-glass on its side, or making it run backwards, to prevent it from running out so long as there appear offerers bidding against each other" (*b*). Except at judicial sales, the practice now is, to knock down the property to the highest offerer, after three fair calls by the judge of the roup (*c*). No time is limited.

The usual terms of payment (*d*) are, that the purchaser shall deposit, or in the option of the exposers grant bond for, the price of the subjects within ten days, under a penalty of *one-fifth* part of the price in case of default, which covers the loss from a resale, or from the acceptance of the next lowest offer (*e*). Previous offerers are bound by their subscriptions during such period after the sale as may be stipulated in the articles of roup (*f*); but the exposers are entitled, on failure of the last offerer, to expose the subjects of new. It is optional to trustees either to resell the estate, in the event of the successful bidder failing to grant bond for the price in terms of his offer, or to fall back upon a previous offer (*g*). Lord St Leonards observed, in reference to a case where there had been two previous obligatory offers, that no trustee would resort to a resale in such circumstances (*h*). But if the trustee will neither enforce the existing obligations nor take steps for a resale, and in the meantime lies by till the property is deteriorated or falls in value, it would seem that he will be answerable for the damage actually resulting from such delay (*i*); though it will not do to debit him with the price of the subjects. But if he adds to neglect the folly of conveying the property without requiring payment of the price from the purchaser, he will undoubtedly be liable as for the full

Settlement of
the Price.

Re-exposure.

21 D. 587; *Gray v. Stewart*, 1753, M. 9560.

(*a*) *Anderson v. Stewart*, 18 Dec. 1814, F. C.

(*b*) Per curiam in *Pet. Burns*, 1807, M. Ap. Sale, No. 4.

(*c*) See form in the Appendix.

(*d*) Appendix, *infra*.

(*e*) *Thomson v. Dudgeon*, 4 June 1851, 13 D. 1029. The purchaser is not liable beyond the amount of the

penalty; *Johnstone's Trs. v. Johnstone*, 19 Jan. 1819, F. C.

(*f*) See *Davidson v. Kerr*, 19 Jan. 1815, F. C.

(*g*) *Walker v. Gavin*, 1787, M. 14193.

(*h*) *Thomson v. Christie*, 1 Macq. 240.

(*i*) *Allan v. Mansfield*, 24 Jan. 1834, 12 S. 329.

value of the property (*a*), conveyance being an act of intromission (*b*). An obligation to grant bond for the price is not implemented by consigning the money in bank in the joint names of the purchaser and agent (*c*); obligations in security of the purchase money being very strictly construed (*d*).

Sale by Private Bargain may be prevented by Inhibition.

Trust deeds very frequently empower the trustee to sell property either by public roup or private bargain. However, if creditors have used inhibition before the date of the trust, the trustee cannot dispose of the property by extrajudicial sale, as the inhibitor would then acquire a preference (*e*). Nor would the accession of the inhibiting creditor obviate the objection, because such accession is presumed to be made under reservation of preferential rights. As a general rule, a trustee for creditors ought not to sell by private bargain; though, where there is a full accession of creditors, and the estate has been already exposed to auction without success, he would be justified in entertaining a private offer, subject to the approval of the creditors.

General Power is a sufficient authority to sell by private Bargain.

As to the power of trustees under family settlements, it has been laid down, that where the direction is general, the trustees may use their discretion in selling either by auction or by private bargain (*f*). In practice, a general power is held to be a sufficient authority to

(*a*) *Thomson v. Christie*, 16 June 1852, 1 Macq. 236.

(*b*) 1 Macq. 242.

(*c*) *Rose*, 10 July 1835, 13 S. 1094; *Hunter v. Bowie*, 16 Jan. 1829, 7 S. 270.

(*d*) *Kennedy v. Ramsay's Trs.*, 22 June 1847, 9 D. 1333; *Menzies v. Barstow*, 4 July 1840, 2 D. 1317; *Dunmore v. Dickson*, 2 Dec. 1834, 13 S. 116; *Davidson v. Kerr*, 19 Jan. 1815, F. C.

(*e*) *M'Lure v. Baird*, 1807, M. App. Competition, No. 3; *Monro v. Gordon's Crs.*, 1777, M. App. Inhibition, No. 1.

(*f*) *Bell's Com.*, 5th Ed. I. 38. As a question of construction, a general power is obviously a power to sell in the same manner as a prudent proprietor might have done. As regards settlement for the purposes of economical

arrangement or disposal of succession, it is clear that the beneficiaries' interest is the same as that of the settlor—namely, to get the largest price for the estate. The trustees may therefore safely be left to use their discretion. But the interest of creditors under a trust for payment of debts being merely to realize their claims, the condition of a public sale seems a necessary precaution, that the trustor's reverentary interest may not be sacrificed to the convenience of creditors. Mr Lewin lays down (4th Ed. 300), that the trustee has an option to sell either by public auction or private contract; but the cases cited (*viz.*, *ex parte Duman*, 2 Rose, 66; *ex parte Harley*, 2 D. & C. 631; and *ex parte Ladbroke*, 1 Mont. & A. 384) relate to sales by assignees in bankruptcy, who are not bound by the conditions of the mort-

carry through a private sale; though it is usual in such cases to consult the wishes of the beneficiaries, or those entitled to act on their behalf.

SECTION II.

OF THE POWER OF TRUSTEES TO GRANT TITLES, AND TO DISCHARGE THE PURCHASER.

Trustees are of course bound by their contract with the purchaser to give him possession of the subject, and to grant such dispositions or other writs as may be necessary for the completion of his title (*a*). As the duty of granting a title arises from obligation *ad factum præstandum*, it may be enforced by personal diligence against the trustee; and recourse may also be had to the remedy of suspension and interdict in the event of any attempt being made to deprive the purchaser of his rights by re-exposing the property, or otherwise (*b*). Trustees for sale are also, like other vendors, bound to purge incumbrances affecting the estate (*c*).

Trustees for Sale are bound to make Delivery and grant Titles.

gage; while in the later case of *Davey v. Durrant*, 2 De G. & J. 535, 26 L. J. Ch. 831, a private sale by a mortgagee was sustained, only because the mortgage gave authority to sell by private contract.

In *Ord v. Noel*, 5 Mad. 440, the Court set aside a sale for behoof of creditors, on the ground that the reversionary interest had been sacrificed by forcing on the sale with undue precipitation. See Sir John Leach's opinion stated *supra*, p. 348; and Sugd. Vend. and Purch., 11th Ed. 61.

In *Harper v. Hayes*, 2 Giff. 210, where, in a family settlement, trustees were empowered to sell the whole real estate, either together or in parcels, and either by public auction or private contract, and the trustee contracted to sell the estate, with the consent of all the *cestuis que trust* except the assignee of one share, for less than was

offered by such assignee, the Vice-Chancellor Stuart set aside the sale, and deprived the trustee of the costs of the suit.

By 23 & 24 Vict. cap. 145, § 1, English trustees invested by any will, deed, or other instrument of settlement, with a power to sell, either generally or in any particular event, are declared to be entitled to sell the estate, either in the whole or in lots, either at one time or at several times, and either by public auction or by private contract.

(*a*) See *Mitchell v. Thomson's Tutors*, 27 Nov. 1827, 6 S. 135; *Dick v. Donald*, 12 Dec. 1826, 2 W. & S. 522.

(*b*) *Cheyne v. Cameron's Trs.*, 19 Jan. 1831, 9 S. 312; *M'Douall v. Milligan*, 17 Nov. 1825, 4 S. 182.

(*c*) *Ralston v. Farquharson*, 17 June 1830, 8 S. 927; *Robertson v. M'Gregor*, 11 Dec. 1840, 3 D. 213.

Warrandice
to be granted
by Trustees.

The proper warrandice to be granted by trustees to purchasers of heritable property was settled by the Court in the case of *Forbes' Trustees v. Mackintosh*, where it was found that the purchasers were entitled "to have a clause of warrandice inserted in the disposition directly binding the truster, his heirs and successors in absolute warrandice, without reference to former trusts; and the trustees in warrandice from fact and deed" (a). This should be expressed in the articles of roup; not left to implication. Heritable creditors selling under a power may bind the debtor in absolute warrandice (b). In either case, the purchaser for an adequate price may demand a good title; by which is meant a title that will secure him not only against eviction, but also against the risk of trouble or expense in defending it (c). Parties acquiring lands under compulsory powers of sale are entitled to warrandice, but cannot withhold payment on account of the badness of the title (d).

Power to
grant Dis-
charges.

The ability of trustees to discharge the price of trust property sold by them involves two questions:—*First*, Is the sale challengeable in a question with a purchaser, as being *ultra vires*? and *secondly*, Is the sale, although within the powers of the trustees, reducible on the ground that they have misapplied the price?

I. *Can a Purchaser be deprived of the Estate on the ground that the Trustees have exceeded their authority?*

Purchaser
ought to satisfy
himself that
Trustees have
a Title and
Power.

The purchaser ought of course to satisfy himself that the title of the trustees is such as he ought to accept. If it should afterwards

(a) *Forbes' Trs. v. Mackintosh*, 15 June 1822, 1 S. 535; *Kelly v. Macindoe*, 6 Mar. 1858, 20 D. 773.

(b) 10 & 11 Vict. cap. 50, § 3. See *Russell v. Mudie*, 28 Nov. 1857, 20 D. 125.

(c) *Dunlop v. Crawford*, 26 May 1849, 11 D. 1063; 25 Jan. 1850, 12 D. 518; *Hope v. Hamilton*, 1 July 1851, 13 D. 1268; *Waddell v. Pollock*, 19 June 1828, 6 S. 999; *Brown v. Cheyne*, 6 Dec. 1833, 12 S. 176. If, in a suit to enforce specific performance of a contract of sale, the Court of Chancery is of opinion that the objections to the trustee's title are bad (although in a popular sense it might be

called a doubtful title), the Court will compel implement. "It is true," said Sir J. Romilly, M.R., in *Wrigley v. Sykes*, 21 Beav. 837, 25 L. J. Ch. 458, "that this Court will not compel a purchaser to take a doubtful title; but if the Court is of opinion that the title at law is clear, and that the contract is clear, the Court is bound so to decide: it cannot speculate upon the question, whether any other Court would come to an opposite or contrary conclusion." (25 L. J. Ch. 460.)

(d) See *Hamilton v. Bridges*, 28 Jan. 1832, 10 S. 262; *Higginbotham v. Clyde Trs.*, 27 June 1843, 5 D. 1367.

appear that their title was defective, the purchaser is in no worse position than if he had bought on an *ex facie* good title from a proprietor in his own right. He has his recourse against the trustees (a); or, if that be excluded by the terms of the warrantice, he may enforce his claim against the trust estate, or against the beneficiaries amongst whom the proceeds of the sale have been divided (b). In the next place, a purchaser from trustees must not only ascertain that they have a title, but also that they are clothed, either expressly or by implication, with a power of disposal of the subjects in question; and if he is led into an ineffectual purchase through neglect of this obvious precaution, it is but just that the loss should fall on him rather than upon beneficiaries, who have taken no part in the transaction (c). It would seem that a *bona fide* purchaser at a sale, under statutory powers, is exempt from liability to eviction on any objection to the proceedings not appearing *ex facie* of his title (d).

The next question for the consideration of an intending purchaser is, whether the sale is matter of express direction in the trust deed; or optional; or conditional upon the necessity that may exist of providing funds for payment of the truster's debts. An express or implied direction to sell excludes the possibility of doubt as to the trustee's power; but a power depending upon circumstances is a more doubtful title, and imposes upon the purchaser the duty of inquiry as to the necessity for the sale. With regard to the extent to which the purchaser's title is liable to be affected by extrinsic circumstances—as to the nature of the inquiries which he is entitled to make, and the degree in which the estate will be bound by the statements of the trustee in answer to such inquiries—our reports, unfortunately, give little or no information. But a distinction has been recognised by English jurists, which appears to be well founded, and will probably be ultimately found to afford a basis for the authoritative settlement of the questions here referred to. The distinction is this: if the settlor *direct* a sale for payment of debts in the event of a deficiency of personal

Purchaser should ascertain whether Power given absolutely or conditionally.

Purchaser not bound to inquire whether Sale necessary;

(a) See *Thomas v. Walker's Trs.*, 4 Dec. 1832, 11 S. 162.

(b) *Bald v. Globe Insurance Co.*, 17 Dec. 1847, 10 D. 289.

(c) *Mags. of Airdrie v. Smith*, 13 July 1850, 12 D. 1222.

(d) *Hamilton v. Chancellor*, 13 Nov. 1833, 12 S. 23.

unless Power
is conditional
on necessity.

Sale in excess
of Power.

estate, a *general* power of sale is held to be implied; the direction being supposed to be added for the guidance of the trustees, with reference to the circumstances in which they are to execute the power that is given to them by implication. As in this case there is no condition in the trustee's title, it is held that the purchaser, who has not the means of examining the trust accounts, is not to suffer prejudice, should it be proved eventually that the sale was unnecessary. The general opinion, therefore, is, that the purchaser is entitled to rely on the assurance of the trustee that a necessity for the sale has arisen (*a*). But if the trustees have only a *power* of sale in the event of a deficiency of personal estate, then such power, when given *per expressum*, is held to be qualified by the condition annexed to it; and the purchaser must, at his peril, ascertain that circumstances have emerged to warrant the execution of the power (*b*).

A purchaser is clearly not bound to ascertain whether the property offered to him is in excess of what will be sufficient to answer the purposes of the trust; for the validity of a sale cannot be supposed to depend upon the issue of an accounting (*c*). However, if the trustees insist on selling, in manifest excess of the required sum, they may be restrained in Scotland by interdict, at the instance of the beneficiary (*d*), and in England by injunction (*e*). Where a power of sale is given for the purpose of enabling the trustee to pay off debts, it has been justly held, in the case of the execution of such a power long after the testator's death, that the lapse of time is a circumstance that ought to put the purchaser on his guard, and lead him to suspect the non-existence of liabilities; for it is unlikely, if there had been any, that the creditors would have allowed the sale to be deferred (*f*). But if the power is to raise funds for the payment of legacies, or provisions prestable at majority or marriage, the necessity of a sale does not occur until the arrival of the period of payment. In such cases, accordingly, postponement of the execution of a power is not necessarily a ground of suspicion, and would not put the purchaser upon a strict inquiry.

(*a*) Lewin, Tr., 4th Ed. 307-8;
Shaw v. Borrer, 1 Keen, 559.

(*b*) *Culpepper v. Aston*, 2 Ch. Ca.
221; *Dike v. Rick's Cr.*, Car. 335;
Lewin, *supra*.

(*c*) *Spalding v. Shalmer*, 1 Vern. 301.

(*d*) *Pender v. Ferguson*, 17 Nov.
1831, 10 S. 19.

(*e*) Lewin, Tr., 4th Ed. 301.

(*f*) *Pierce v. Scott*, 1 Y. & C. 257.

It has been thought that, in the case of a purchase from trustees possessing on a personal title, the taking of infestment on an open precept for infesting the trustees *in trust for uses and purposes*, and their assignees, might not tend to affect the purchaser's title with the conditions of the trust. But this view appears to be erroneous (a). Since the abolition of the precept of sasine, the question is no longer of practical importance.

Effect of condition in Purchaser's infestment.

To obviate doubts or questions as to the competency of the exercise of powers of sale, it is not unusual in the case of trusts for creditors to take the title of the trustee in the form of a disposition qualified by a back-bond or declaration of trust. Until the title-deed is recorded for infestment, the property is safe from the diligence of adjudging creditors of the trustee, as they could only take *tantum et tale* (b); and although the estate might be carried off by a sequestration, yet, as the risk is slight where the trustee is a responsible person, it is desirable to take the conveyance in this form for the sake of enabling the trustee to offer a title to purchasers which is entirely free from latent objections (c). Before granting a conveyance to the purchaser, the title of the trustee should be put upon record, which will have the effect of protecting the former from any future claim relative to the administration of the purposes of the trust.

Sales under *ex facie* absolute Dispositions.

As to purchases from heritable creditors vested with powers of sale, these are safe from challenge if the bond is regular, and the requisites of the Heritable Securities Acts have been complied with. The purchaser is bound to ascertain that the usual intimation and advertisements have been made.

Purchases from Creditor selling under a Power.

II. Assuming the Sale to have been within the Powers of the Trustee, is the Purchaser bound to see to the Application of the Price?

That words exempting trustees from the necessity of seeing to the application of purchase-money have been adopted as a matter

No authority for holding Purchaser liable when Price misapplied.

(a) *Cockburn v. Cameron*, 4 June 1836, 14 S. 891; Bell's Pr. § 877.

(b) *Macdowal v. Russell*, 6 Feb. 1824, 2 S. 682; *Thomson v. Douglas, Heron, & Co.*, 1786, M. 10229; *Preston v. Dundonald's Cr.*, M. "Personal and Real," No. 2.

(c) *Somerville's Trs. v. Redfearn*, 1 June 1813, 1 Dow, 50; revg. M. "Pers. & Real," No. 3; *M'Cubbin v. Ferguson*, 1715, M. 10215; *Brugh v. Forbes*, 1715, M. 10213, and cases in M. voce "Personal & Real," *Dewar*, 1792, Bell's 8vo Ca. 541.

of usual style in trust conveyances for sale, may be thought to argue some doubt as to the safety, under all circumstances, of purchasers paying to the trustee on his own receipt. But the fact that no precedent is to be found among the decisions of the Court of Session for fixing liability on a *bona fide* purchaser, in respect of misappropriation of the price (a)—when contrasted with the mass of decisions in England (b), where the purchaser's liability depends upon the terms of the power of sale, seems sufficient to negative the supposition of any such liability existing under the law of this country. It is clear, that unless the interests of the creditors or other beneficiaries are protected in the infestment taken upon the purchaser's title, the purchaser cannot incur responsibility to them on the footing that their interests affect the lands (c). But it appears to us that it is only through the lands that the purchaser can be reached in a question with a beneficiary. Personally he is under no obligation, and has incurred no liability. If a settlor empowers his trustees to change the investments of his succession, in so doing he virtually disconnects the legal estate from the purposes of the trust, and we do not see how a purchaser can be liable to the beneficiaries in respect of the misapplication of the price of that estate. The price alone is available to the beneficiary as a security, and in the same degree as the land for which it forms the surrogatum. In those exceptional cases in which lands may be reclaimed from a *bona fide* purchaser (as where the purchaser has been deceived as to the nature of the title), he will be entitled to retain profits received and consumed (d).

Purchaser
owes no duty
to the Benefi-
ciary.

English doc-
trine.

The principles upon which the Court of Chancery (e) has proceeded in determining the liability of purchasers, seem to be in-

(a) See, however, *Steven, Glen, Currie, & Fleming*, 19 Feb. 1811, F.C.

(b) See a summary of them, occupying 30 pages of Mr Lewin's Treatise, pp. 430-460.

(c) *Macdonald v. Place*, 24 Feb. 1821, Hume, 544; *Caldar v. Stewart*, 18 Nov. 1806, Hume, 440; *Campbell v. Campbell*, 12 Feb. 1811, Hume, 444.

(d) *Cleghorn v. Elliott*, 10 June 1842, 4 D. 1389; *Hamilton v. Chancellor*, 13 Nov. 1833, 12 S. 22; and see Dict. voce *Bona fide Consumption*.

(e) If trustees are expressly empowered to give receipts, that relieves the purchaser from all concern with the application of the price (see W. & T. L. Ca. 50). The difficulty arises where there is no such authority. The leading case is *Elliot v. Merryman*, Barn. 78, 2 Atk. 4, where three propositions were laid down by the Master of the Rolls (Hon. J. Verney), which are admitted to be the basis of the English law on the subject. These are, (1) That a purchaser of *personality*

consistent with the theory of Scotch law as to the relation between trustee and beneficiary. To explain this, it is only necessary to observe, that in the case of trusts created for payment of debts not specified, or for payment of debts and legacies, the rule, as laid down by Lord Lyndhurst in *Forbes v. Peacock* (a), and more precisely by Lord St Leonards in *Stronghill v. Anstey* (b), is, that the purchaser should in no case, in the absence of fraud, be bound to see to the application of the money raised; for the transaction is not to be hung up until all claims against the estate are settled. But in the case of a simple trust for sale to divide the proceeds between certain beneficiaries named in the deed, then, as there is no continuing

Purchasers only liable to see to application, in the case of a Trust for immediate distribution amongst parties named in the Settlement.

is not responsible for the misapplication of the purchase-money, except in cases of fraud; (2) That when *real* estate is devised to trustees, upon trust to sell for *payment of debts generally*, the purchaser is not bound to see to the application of the price; (3) Where the trust is for payment of certain debts to debtors *mentioned specifically*, so that there is no necessity for postponing the distribution of the purchase-money, the purchaser is bound to see that it is rightly applied.

The 3d rule is in *viride observantia*, and is applicable not only to trusts *inter vivos* for payment of specified or scheduled debts, but also to the case of a trust for payment of legacies or annuities, where (assuming that the personal estate is sufficient to meet the settlor's general liabilities) there is truly nothing more than a trust for immediate distribution (*Johnson v. Kennett*, 3 My. & K. 630; *Horn v. Horn*, 2 S. & S. 448).

The 2d rule was established in its generality (and so as to include trusts for payment of legacies) by *Stronghill v. Anstey*, as mentioned in the text. It is immaterial whether there is an express trust for sale or merely a charge upon the lands. This was authoritatively settled by the decisions of Lord Langdale in *Shaw v. Borrer*, 1 Keen, 559, and afterwards of Lord Cottenham in *Ball v. Harris*, 4 My. & Cr. 264.

The 1st rule is founded on the principle, that as the executor is charged with the payment of the debts of the testator in a due course of administration, personalty cannot be immediately distributed; and, as already observed, the purchaser is not to be subjected to a contingent and uncertain liability (*Ewer v. Corbet*, 2 P. W. 148; *Andrew v. Wrigley*, 4 Br. C. C. 136; and the more recent cases of *Miles v. Darnford*, 2 De G. M'N. & G. 641, and *Haynes v. Forshaw*, 11 Hare, 93). "But personal estate may be clothed with such a particular trust, that it is possible the Court in some cases may require a purchaser of it to see the money rightly applied" (per the M. R. in *Elliot v. Merryman*, *supra*).

(a) *Forbes v. Peacock*, 1 Phil. 717.

(b) *Stronghill v. Anstey*, 1 De G. M. & G. 653, confirming *Page v. Adam*, 4 Beav. 429, where Lord Langdale intimated an opinion that the distinction formerly taken between legacies and annuities was untenable. *Stronghill's* case is chiefly important from Lord St Leonards' emphatic repudiation of the doctrine, that the Court might inquire whether there were or were not debts due at the testator's death. The *purpose* of payment of debts is, in fact, the only intelligible criterion of liability.

Argument
from the nature
of the Benefi-
ciary's interest
in Scotland.

trust tending to interfere with the immediate payment of the money to the parties beneficially interested, it is held that the purchaser is charged with the duty of protecting their interests, and that they have a right, as equitable proprietors, to claim the money from him. By the law of Scotland, on the other hand, the trustee is vested with the full legal title to the property as donee, and the beneficiary has only a *jus crediti* or personal right of action against the trustee, which does not carry with it the right of suing the debtors of the trust estate, or entitle the beneficiary to grant a discharge. Such being the case, it is thought that, as the beneficiary, even under a trust for immediate distribution, is not in a position to demand payment from the purchaser, neither is the purchaser bound to recognise his interest in the transaction; but is bound only to pay to the trustee with whom he contracts.

Exceptions.

Fraud or con-
nivance on the
part of the Pur-
chaser.

It is doubtful, however, whether sums advanced by a purchaser to a trustee, on the faith of the sale being afterwards completed, would be good payments in a question with the beneficiary; such advances not being made on the security of the trust estate (a). And if a purchaser connive at the malversation of the price, or become a party to any arrangement for the investment of the proceeds in the name of an individual trustee (b), or go into the transaction in the knowledge of a latent trust inconsistent with the title (c), we may assume that he would be liable to pay over again, on the analogy of the cases as to payment of trust debts to an executor *suo nomine*. The observations of Lord Stair, as to the liability of singular successors for the fraudulent acts of their ancestor, ought to be conclusive of the main question. "Fraud," he observes (d), "being of a criminal nature, it is not relevant against singular successors, not partakers of the fraud, but only against the committers of the fraud, and those representing them, especially as to feudal rights; for so it is expressly provided by the fore-mentioned statute (e);

(a) *Gordon v. Anderson*, 1748, M. 16208, 6583, Elch. Trust, No. 14.

(b) *Taylor v. Forbes & Co.*, 14 Dec. 1830, 4 W. & S. 444, revg. 5 S. 785; *Barrett v. Duncan*, 14 Dec. 1831, 10 S. 128; *Tait v. Kay*, 1779, M. 2142; *Alison v. Fairholme*, 1765, M. 15132; and see the Chapter on Liability.

(c) *Lang v. Mag. of Dumbarton*, 29 June 1813, F. C.

(d) *Stair*, 4, 40, 21.

(e) 1617, c. 12. The statute, however, only applies to the case where prescription has run on the fraudulent act.

the reason whereof is to secure land rights, and that purchasers be not disappointed; and therefore no action can be effectual against them, upon the fraud of their authors, unless they were accessory thereto, *at least by knowing the same when they purchased*; but supervenient knowledge will not prejudice them."

In sales by heritable creditors, provision has been made by statute for securing purchasers against double distress for the price of the subjects; it being enacted (a), that the creditor, upon receipt of the price, shall be bound to consign the surplus which may remain after deducting his debt, with interest and expenses, and after paying all previous incumbrances and the expense of discharging the same, in one or other of the Banks in Scotland incorporated by Act of Parliament or Royal Charter, or in a branch of any such bank, in the joint names of the seller and purchaser, for behoof of the party or parties having best right thereto. And it is further enacted (b), that upon a sale being carried through in terms of the Act, and upon consignment of the surplus of the price, the disposition by the creditor to the purchaser shall have the effect of completely disencumbering the lands and others sold of all securities and diligences posterior to the security of such creditor, as well as of the security and diligence of such creditor himself. Corresponding provisions in relation to judicial sales at the instance of creditors or of apparent heirs, were incorporated with the Bankruptcy Act (c) and the Judicial Procedure and Securities Act of 1856 (d).

Statutory Discharge of Purchasers from Heritable Creditors.

A purchaser from an heritable creditor, or trustee for creditors, paying the surplus funds into the hands of the exposor (e), does so at his own risk; for he is bound either to settle extrajudicially with the other secured creditors, or to consign the balance in terms of the statutes (f). However, a purchaser will not be justified in consigning the portion of the price which is applicable to the payment of the debt of the exposor; and it would seem, that if he consigns

Consequence of paying to the Exposor.

(a) 10 & 11 Vict. cap. 50, § 8.

(b) Ibid. § 9.

(c) 19 & 20 Vict. cap. 97, § 113.

(d) 19 & 20 Vict. cap. 91, § 2.

(e) *M'Lane v. Robertson*, 29 Nov. 1825, 4 S. 232; *Crawford v. Walker*, 31 Jan. 1827, 5 S. 259; *Wilson v.*

Stirling, 14 Mar. 1843, 8 D. 1261, per Lord Ivory.

(f) See *E. of Dunmore v. Dickson*, 2 Dec. 1831, 13 S. 116; *Steven v. Glen*, 19 Feb. 1811, F. C.; *Falconer v. M'Intyre's Tr.*, 30 Nov. 1814, overruling *Middleton v. Falconer*, 1756, M. 1363.

rashly, he will be liable in legal interest for the time during which payment has been withheld (a). Before payment of the surplus, the purchaser may insist for a decree declaring the subjects to be freed and disburdened of the debt. He is not, however, entitled to a discharge from the postponed creditors; who, on the other hand, are not entitled to insist in their security to any other effect than that of recovering the surplus proceeds of the sale (b).

SECTION III.

OF PURCHASES OF TRUST PROPERTY BY TRUSTEES.

In order to the full development of the rule of law, which protects trust property from appropriation by persons entrusted with the execution of powers of sale, we shall consider, *first*, the extent of the disability; *secondly*, the nature of the remedy.

I. *Who are disqualified for purchasing Trust Property?*

Trustee cannot enter into profitable transactions with the estate.

The leading rule on this subject may be deduced from equitable considerations of a very general nature, such as—that persons standing in a relation of confidence towards others ought not to be allowed to engage in any transaction whereby the interests of their constituents are put in jeopardy. Speaking generally, we may say that, at common law, a trustee for sale (that is, any person exposing for sale property not his own) is disqualified from becoming a purchaser for his own benefit (c), whether the property consists of heritable subjects (d), or of corporeal moveables, such as ships (e), or of assignable rights, such as debts (f) or shares (g); whether the

(a) *Campbell v. Cullen*, 13 July 1849, 11 D. 1354.

(b) *Wilson v. Stirling*, 14 Mar. 1843, 8 D. 1261; *Young v. Grierson*, 19 July 1849, 11 D. 1482.

(c) *York Buildings Co. v. Mackenzie*, 1798, M. 16212, 18367, revd. 13 May 1795, 3 Pat. 378; 8 Br. Par. C. 42; *Brisbane's Trs. v. Crawford*, 3 Feb. 1826, 4 S. 422; *Jeffrey v. Aiken*, 16 June 1826, 4 S. 722; *Gourlay's Trs. v. Kerr*, 6 June 1857, 19 D. 789; and

see *Aberdeen Ry. Co. v. Blaikie*, 19 Nov. 1851, 14 D. 66, revd. 20 July 1854, 1 M'Q. 461.

(d) *York Buildings Co. v. Mackenzie*, *Jeffrey v. Aiken*, *supra*, etc.

(e) *Elias v. Black*, 9 July 1856, 18 D. 1225.

(f) *Thorburn v. Martin*, 8 July 1853, 15 D. 845; *Mackellar v. Balmain*, 8 Mar. 1817, 19 F. C. 320.

(g) *Gourlay's Trs. v. Kerr*, *ubi supra*.

purchase be made by bargain (a), or at a public auction (b); in his own name, or through the intervention of another (c); for himself, or as the representative of parties interested in the estate (d); by his own authority, or with the sanction of his co-trustees (e). It is assumed that the motives of parties engaged in such transactions are expressed in the maxim of political economy—*Emptor emit quàm minime potest, venditor vendit quàm maxime potest*; and such conflicting motives ought to have no place in the mind of a trustee.

In one of the most recent cases relating to transactions of profit between trustees and their constituents, Lord Brougham begins by observing, "I also arrive at exactly the same conclusion with my noble and learned friend (Lord Cranworth), that the law of Scotland differs in no respect from the law of England upon this matter, as to which it is very important to have it understood, that there is really no difference between the two systems of jurisprudence" (f). Although identical in principle, yet, as regards the mode of applying the principle, it may be questioned whether the two systems run exactly parallel. On this account, and as the decisions are very numerous, we have thought it better to give the reader the means of instituting a comparison for himself, by confining our illustrations of English law, as usual, to the foot of the page (g).

English and
Scotch doc-
trines com-
pared.

(a) See *Browning v. Hamilton*, 25 May 1837, 15 S. 1004.

(b) *York Buildings Co. v. Mackenzie, Jeffrey v. Aiken*, *ubi supra*; *Whyte's Trs. v. Burt*, 13 Feb. 1851, 13 D. 679; *Elias v. Black*, 18 D. 1229.

(c) *Jeffrey v. Aiken*, *ubi supra*; *Anderson v. Stewart*, 18 Dec. 1814, 18 F. C. 108; *Taylor v. Watson*, 20 Jan. 1846, 8 D. 400; *Brown v. Burt*, 23 Dec. 1848, 11 D. 338.

(d) *Maxwell v. Drummond's Trs.*, 21 Jan. 1823, 2 S. 130; *Drysdale v. Nairne*, 28 Jan. 1835, 13 S. 348.

(e) *Thorburn v. Martin*, 15 D. 852, per Lord Wood; *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 473, per Lord Cranworth; *Brisbane's Trs. v. Crawford*, 3 Feb. 1826, 4 S. 422.

(f) *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 477; and see *ibid.* p. 473-4, per Lord Cranworth.

(g) The rule laid down in the leading English case of *Fox v. Mackreth*, 2 Br. C. C. 400, 2 Cox, 320, was, that a purchase by a trustee for sale from his *cestui que trust* (and *a fortiori* a purchase by the trustee from *himself*), although he may have given an adequate price and gained no advantage, shall be set aside at the option of the *cestui que trust*, unless (1.) the connection between them appear to have been completely dissolved; and (2.) that all knowledge of the value of the property acquired by the trustee has been communicated to his constituent (Wh. & T. L. Ca. 125). "It is founded upon this:—that though you may see, in a particular case, that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence, in ninety-nine cases out of a hundred, whether he has made advan-

York Buildings Co. v. Mackenzie.

The leading authority in this department of what we may be permitted to call the British common law, is the celebrated case of the *York Buildings Co. v. Mackenzie* (a), decided on appeal from the Court of Session. The grounds of this action were well adapted to illustrate the perfectly general character of the rule, which was there laid down for the first time; and it has accordingly become a precedent for the decision of a host of analogous cases under the English and Scotch equitable jurisdiction (b). The respondent in that case, while filling the office of common agent in the sale of the Scotch estates of the York Buildings Company, which was insolvent, purchased a portion of them at the judicial auction; and though he had remained in possession for above eleven years after the purchase, and had entirely freed himself from all imputation of fraud, yet the Court of appeal ordered him to reconvey the property, holding that his situation as common agent made it his duty, both to the company and their creditors, to obtain the highest price,—a duty which could not be fulfilled if he became a purchaser (c).

Reason for the disability.

The manner in which the interest of a purchasing trustee may be brought into conflict with his duty, is explained in Lord President M'Neill's opinion in a recent case (d), where the property, a vessel, was bought by the creditor in a judicial sale. "It is impossible," he observed, "to say, that a party who takes the management of a sale of property so implicitly as Black did through Pirie, had not a fiduciary character in reference to the owner, and all parties interested. He had the vessel in his own keeping, and had

tage or not" (per Lord Eldon in *ex parte Lacey*, 6 Ves. 627).

(a) 3 Pat. 378; 8 Br. P. Ca. 42.

(b) Per Lord Brougham in *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 478. It appears, however, to have been considered by some of the English jurists that such a sale might be sustained, if it were clear that the agent had dealt openly with his constituent (see Wh. & T. L. Ca. 130); the principle being, as laid down by Lord Erskine in *Lowther v. Lowther*, 13 Ves. 103, "that an agent to sell shall not convert himself into a purchaser, unless he can make it perfectly clear that he fur-

nished his employer with all the knowledge which he himself possessed." It is quite well settled, as Sir E. Sugden, L.C., remarked, in *Murphy v. O'Shea*, that it is not necessary to prove under-value; though he added, "The rule of the Court does not prevent an agent from purchasing from his principal, but only requires that he shall deal with him at arm's length, and after a full disclosure of all he knows with respect to the property" (2 J. & Lat. 425).

(c) 3 Pat. 393, per Lord Thurlow.

(d) *Elias v. Black*, 11 July 1856, 18 D. 1225.

it in his power to bring on the sale tardily, or at a time suitable to himself. I do not say that he did so; but he had it in his power to do so. He suggested the valuers, who, although acting perfectly honestly, might yet have opinions in regard to the vessel favourable to him. Reference is made to his agent when he had the vessel in his hands, and who might encourage or discourage people from bidding at the sale." His Lordship went on to say, "But if Black had abstained altogether from doing anything further than setting a-going the proceedings by bringing the summons of sale, it is not very easy to see whether, in that case, it might not have been perfectly legal for him to become the purchaser" (a).

It will be proper to consider how far this suggestion of a doubt as to the illegality of a purchase by a trustee or party to judicial proceedings who does not interfere *actively*, is supported by previous authorities. On the one hand, it is certain that the counsel who merely signs a petition for a warrant of sale is free to become a purchaser (b); from which we may infer that persons who have no *duty* to perform to the owner or his creditors, and no *means or opportunities* of gaining an advantage through their position, are excepted from the rule. The case of *Darling v. Adamson* (c), where a purchase by the husband of one of the beneficiaries was sustained, is similar. Clearly his relations with the trust were not fiduciary, nor does it appear that he had any power of controlling the sale. It is held in England, that the merely nominal position of a trustee to preserve contingent remainders does not disqualify the party from purchasing, the estate being exposed by trustees under a *different appointment* (d). But, on the other hand, it is not permitted to an heritable creditor to become a purchaser of property brought to sale under a power in his bond (e), though Lord Mackenzie thought that he might apply to the Court for the appointment of a judicial manager of the sale, with a view to becoming a buyer (f). The observations of Lords Brougham and Cranworth,

Whether the illegality of the transaction depends on the circumstance of the party acting as Trustee.

(a) 18 D. 1230.

(b) *E. of Wemyss v. Montgomery*, 25 Feb. 1824, 2 S. Ap. Ca. 8.

(c) *Darling v. Adamson*, 8 Dec. 1838, 1 D. 213.

(d) *Sutton v. Jones*, 15 Ves. 587; *Naylor v. Winck*, 1 S. & S. 567.

(e) *Jeffrey v. Aiken*, 16 June 1826, 4 S. 722; *Taylor v. Watson*, 20 Jan. 1846, 8 D. 400.

(f) 8 D. 406; and see *Drummond v. Maxwell*, 21 June 1823, 2 S. 130. In England, a mortgagee, with a *power of sale*, is subject to the same disquali-

in the two cases quoted below (a), clearly imply that the disability to contract with their constituents, attaching to trustees and managers, is not obviated by their remaining neutral; because it is the duty of such persons to interfere actively, and to use the knowledge acquired as trustee, not for their own advantage, but for the benefit of their employers.

Court will not allow inquiry into the fairness of the transaction.

The Court has certainly never given any encouragement to the notion that evidence of the trustee having actually gained an advantage was necessary to invalidate the purchase. In the case of *Jeffrey v. Aiken*, the evidence was all the other way; because the property was bought in after a competition, and that only to prevent the lands from going at a lower price, which must have been the result had the creditor not offered more. There was no imputation of unfair dealing, and the Court must have gone on the principle that a trustee cannot be the purchaser at a sale under his own authority (b). In *Taylor v. Watson*, Lord Jeffrey observed, that the rule was so peremptorily fixed, that the Court should not be tempted by considerations of equity to unsettle it. "It is now *presumptio juris et de jure*," he said, "that where a person stands in these inconsistent relations of buyer and seller, there are dangers; and it is not relevant to say, that it is impossible there could be any in the particular case" (c). The doctrine thus generally stated has been affirmed by the decisions of the House of Lords already referred to; and as it is obviously impossible to demonstrate, in the generality of cases, whether the terms on which a trustee has dealt with the estate or interests of his constituents have been the best attainable,

fication as a trustee (*Waters v. Groom*, 11 Cl. & Fin. 684; *Downes v. Glazebrook*, 3 Mer. 200); but a purchase of the reversion or "equity of redemption" from the proprietor is not impeachable on equitable grounds, for the relation between the parties is that of contract (*Knight v. Marjoribanks*, 2 Macn. & G. 10). In this case the mortgagee was trustee for the mortgagor of other property; but Lord Cottenham held that the existence of the fiduciary relation could not affect the fairness of transactions unconnected with the subject of the trust.

(a) *Hamilton v. Wright*, 2 Aug. 1842, 1 Bell, 591, per Lord Brougham; *Aberdeen Ry. Co. v. Blaikie*, 20 July 1854, 1 Macq. 473, per Lord Cranworth; *York Buildings Co. v. Mackenzie*, 3 Pat. 398, per Lord Loughborough. ‡

(b) *Jeffrey v. Aiken*, 16 June 1826, 4 S. 722, as explained per Lord Fulterton in *Taylor v. Watson*, 8 D. 407; and see Lord St Leonards' dictum, *supra*, p. 362, note.

(c) 8 D. 407.

the rule has been established, that no inquiry on that subject will be permitted (a). Besides, if a trustee were permitted to come forward openly as a purchaser, that would discourage others from coming forward against so formidable a competitor, and so the sale would be chilled (b).

The rule which prohibits trustees for sale from becoming purchasers is applicable not only to those whom the law regards as trustees *virtute officii*, as trust disponees (c), executors, guardians, and judicial factors, but to all who, in relation to the transaction itself, have a duty to perform towards the beneficiary, as interdictors (d), stockbrokers (e), directors of banking and railway companies (f); the agent (g) or auctioneer employed to effect the sale (h); the common agent in a judicial sale (i); the commissioners (k) and trustees on sequestrated estates (l). And if an heir of entail, taking advantage of the provisions of the 42 Geo. III. cap. 116, as

The Rule applies to Factors, Agents, Auctioneers, etc.

(a) *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 472, per Lord Cranworth. See also *Fraser v. Hankey*, 9 D. 423, per Lord Pr. Boyle; and *York Buildings Co. v. Mackenzie*, 3 Pat. 395, per Lord Thurlow, quoting Lord Hardwicke.

(b) *Ex parte Lacey*, 6 Ves. 629.

(c) *Brisbane's Trs. v. Crawford*, 3 Feb. 1826, 4 S. 422.

(d) *Gillies v. Maclachlan's Reps.* 11 Feb. 1846, 8 D. 487.

(e) In *Gillett v. Peppercorne*, 3 Beav. 78, Lord Langdale, M.R., set aside a sale of canal shares, which the stockbroker who was employed to purchase them had bought from a person who was truly a trustee for himself; for, said his Lordship, "where a man employs another as his agent, it is on the faith that such agent will act in the matter purely and disinterestedly for the benefit of his employer, and assuredly not with the notion that the person whose assistance is required as agent has himself, in the very transaction, an interest directly opposed to that of his principal" (3 Beav. 83). This was the case of an agent selling to his constituent; but in the earlier case of *Brookman v. Rothschild*, 3 Sim. 153,

Lord Lyndhurst set aside a transaction in which the late Mr N. M. Rothschild, when employed to sell 20,000 French rentes, had taken these securities to himself, giving credit for them—so his Lordship held—at the fair price of the day; adding, however, that the Court must maintain the principle that an agent, if he accepts the employment, is bound to sell, and is not at liberty to take over the stock, giving credit for the price.

(f) *Thorburn v. Martin*, 8 July 1853, 15 D. 845; *Aberdeen Ry. Co. v. Blaikie*, 20 July 1854, 1 Macq. 461.

(g) *Gourlay's Trs. v. Kerr*, 6 June 1857, 19 D. 789. *Infra*, p. 67.

(h) *Jeffrey v. Aiken*, 16 June 1826, 4 S. 722; *Cree v. Durie*, 1 Dec. 1810, 16 F. C. 66.

(i) *York Buildings Co. v. Mackenzie*, 3 Pat. 378.

(k) 19 & 20 Vict. cap. 79, § 120; *Drew v. Paterson*, 2 Dec. 1825, 4 S. 259; *Mackellar v. Balmain*, 8 Mar. 1817, 19 F. C. 320.

(l) *Id. Stat.* § 120; *Whyte's Tr. v. Burt*, 23 Dec. 1848, 11 D. 338; 13 Feb. 1851, 13 D. 679; *Fraser v. Hankey*, 13 Jan. 1847, 9 D. 415.

to the redemption of land-tax, sell a larger portion of the estate than is necessary for that purpose, or become the purchaser of the lands either *suo nomine* or through a confidential person, the sale will be reduced (a); and the reduction may even be enforced at the instance of succeeding heirs against an onerous purchaser, if there was a manifest excess (b).

How far the Beneficiary is excluded from purchasing.

Parties who are beneficially interested in the estate are disqualified from purchasing at an auction on a different ground, viz., because they are regarded as virtually occupying the position of exposers, and are consequently not entitled to raise the price on *bona fide* purchasers (c). A bankrupt cannot purchase the sequestrated estate (d), and the privilege of purchasing is enjoyed by creditors only in virtue of the statutory declaration to that effect (e). In *Darling v. Adamson* (f), where the purchaser was the husband of one of the beneficiaries, the purchase was objected to on the ground that the sale had been carried through in a process of implement raised by the beneficiaries; but the sale was sustained. However, in the more recent case of *Faulds v. Corbet* (g), it was held that a sale to a residuary legatee was reducible at the instance of a previous bidder, as being substantially an attempt to raise the upset price by one who was in reality the exposor of the subjects.

Purchases by Creditors of the Trust Estate.

With respect to sales for behoof of creditors, the capacity to purchase depends partly on statute and partly on common law. At common law, creditors selling under a power of sale (h), or in a judicial process of sale (i), have been held disqualified, and the disability has not been removed by the recent statutes. If the exposing creditor is a corporation or a trust, the trustees or corporators are precluded from bidding, either in their representative capacity or as individuals (k). Under the late Bankruptcy Act (l),

(a) *Elliott v. Wilson*, *infra*; *Hamilton v. Millar*, 10 Dec. 1830, 9 S. 165.

(b) *Elliott v. Wilson*, 9 Feb. 1826, 4 S. 429; *affd.* 2 May 1828, 3 W. & S. 60.

(c) Bell's Pr. § 131, and cases there cited.

(d) *Anderson v. Stewart*, 18 Dec. 1814, F. C.

(e) 19 & 20 Vict. cap. 79, § 120.

(f) *Darling v. Adamson*, 8 Dec. 1838, 1 D. 213.

(g) *Faulds v. Corbet*, 25 Feb. 1859, 21 D. 587.

(h) *Taylor v. Watson*, 20 Jan. 1845, 8 D. 40; *Jeffrey v. Aiken*, 16 June 1826, 4 S. 722.

(i) *Elias v. Black*, 9 July 1856, 18 D. 1225.

(k) *Maxwell v. Drummond's Trs.*, 21 Jan. 1823, 2 S. 130.

(l) 2 & 3 Vict. c. 41, § 99.

which declared that it should be lawful to *any* creditor to purchase estates sold in virtue of its provisions, it was ruled that a purchase by a heritable creditor, who held a security over the lands, was valid (a). The present Bankruptcy Act enacts (b), that "when any estate is sold *publicly* by virtue of this Act, it shall be lawful for any creditor to purchase the same; but the trustee, or commissioners, or adjudger, selling as aforesaid (c), shall not be entitled to purchase." The 29th section of the Personal Diligence Act (d) provides, that where goods are sold by public roup under the authority of the Sheriff, "it shall be lawful for the poulder or any other creditor to purchase the same."

It may be doubted whether an agent is disqualified in consequence of the general relation subsisting between himself and the beneficiary, or if the disqualification arises only from his being employed in connection with the sale. Where the agent is himself the vendor (e), or where he has even a general management, the purchase is clearly illegal (f). If the employment is special, and relates to an entirely different matter, there can, we apprehend, be as little doubt that the agent is free to purchase. A more difficult case is presented in *Drysdale v. Nairne* (g). The agent in this case was trustee under a voluntary trust disposition, and in that capacity had made large advances to his client. After her death, a creditor holding a preferable security brought the property to sale under a power in the bond. The trustee, who was in effect a postponed creditor, bought in the estate at the price of L.4600, in order to preserve his security, which would have been lost if the estate had been sold for an inadequate price. At the same time, he intimated to the truster's heir-at-law that he would hold himself

Disability of Agents.

(a) *Cruickshank v. Williams*, 15 Feb. 1849, 11 D. 614.

(b) § 120. The assignees of an English bankrupt cannot purchase the trust property. See *ex parte Chadwick* and *ex parte Thwaites*, cited in *Montague and Ayrton on Bankruptcy*, 2d Ed. I. 329 and 323, and cases cited in *Wh. & T. L. Ca. I.* 133. Lord Eldon doubted whether the assent of the majority of the creditors would validate the transaction (*ex parte Lacey*, 6 Ves. 628), notwithstanding Lord

Hardwicke's decision to the contrary in *Whelpdale v. Cookson*, 1 Ves. 9, 5 Ves. 682.

(c) See § 112, 113.

(d) 1 & 2 Vict. cap. 114.

(e) *Gourlay's Trs. v. Kerr*, 6 June 1857, 19 D. 789.

(f) *Thorburn v. Martin*, 15 D. 849, per Lord J. C. Hope.

(g) *Drysdale v. Nairne*, 28 Jan. 1835, 13 S. 348. See *Lowther v. Lowther*, and *Murphy v. O'Shea*, stated *supra*, p. 362.

accountable for any surplus which the estate might ultimately yield. No decision was pronounced on the merits of this case ; but it is clear that the trust remaining in the purchaser was a function quite distinct from that of the power of sale, which was conferred on a different party, and in relation to a different transaction. Both the purchaser and the vendor, however, were trustees for the heir's reversionary interest ; and as no profit could be made by either of them, we do not see on what principle the transaction could be condemned.

Trustee may purchase from the Beneficiary.

If the trustee has been authorized by the truster or by the beneficiaries, being *sui juris*, to become a purchaser, the right of challenge is barred (a); and on similar grounds, it would appear that a purchase from the beneficiary himself is unobjectionable (b); though it must be admitted that this branch of the subject has not been elaborated by our Courts with the same care as it has been in England (c). But a trustee is not entitled to sell to his co-trustee under any circumstances ; and where the truster retains an interest in the property, as in trusts for payment of debts, he may object to an offer being received on behalf of the trustee, although the creditors consent (d).

Objection held to be obviated by Resignation.

The disability has been held to be obviated by the resignation of the trustee before any step has been taken to carry through the sale, on the ground that the purchaser is then no longer in the position of having a duty to discharge adverse to his interest as purchaser (e).

(a) *Fraser v. Hankey*, 13 Jan. 1847, 9 D. 415.

(b) *Browning v. Hamilton*, 25 May 1837, 15 S. 999.

(c) See *Brisbane's Trs. v. Crawford*, 3 Feb. 1826, 4 S. 422. Lord Eldon's judgments on this point do not exhibit that degree of consistency and clear apprehension of principle that usually characterized his decisions. For example, in commenting (in *ex parte Lacey*, 6 Ves. 627) upon *Fox v. Mackreth*, Lord Eldon argued that the judgment could only be defended on the principle that all transactions between trustee and beneficiary were forbidden while the relation subsisted, for there was no reason to impute unfairness to Mackreth in the transactions. But in *Coles v. Trecothick*, 9 Ves. 234, his

Lordship sustained a purchase by a trustee for payment of debts from the beneficiary, on the ground that the sale had been carried through by the beneficiary himself, without the active interference of the trustee ; adding, "A trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended that the trustee should buy ; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee."

(d) See Lewin on Trusts, 4th Ed. 338.

(e) *Gillies v. M'Lachlan*, 8 D. 493.

Accordingly, where the trustee on a sequestrated estate had been superseded in consequence of having attempted to purchase the bankrupt's property at an auction, and the Court in consequence ordered the subjects to be re-exposed, he was permitted to purchase the same property from the new trustee (a).

Conflicting opinions as to a trustee's right to purchase after retiring have been entertained by the judges of the Court of Chancery. Thus in *ex parte James* (b), Lord Eldon observed :—" With respect to the question, whether I will permit Jones to give up the office of solicitor, and to bid, I cannot give that permission. It would lead to all the mischief of acting up to the point of sale, getting all the information that may be useful to him, then discharging himself from the character of solicitor, and buying the property." Lord Cranworth, however, has since observed, in a Scotch appeal case, that the more accurate rule would be, that while the relation subsisted, there should be no such dealing ; *but after cesser of the relation, the purchaser should be permitted to show fairness in the transaction* (c).

Doctrine of the Court of Chancery.

In connection with the subject of purchases by trustees, we may notice the case of a trustee acquiring property without onerous cause ; in which case it would seem the acquisition ought to result to the heir (d). The principle of constructive trust applies also to the case of a purchase by a trustee of property in which the beneficiary has only a partial interest (e).

Trustee acquiring without onerous cause.

II. Remedies competent to the Beneficiary.

As pertaining to the law of the *remedy*, we shall have to consider the nature of the procedure against purchasers and singular suc-

per Lord Cuninghame ; *Broun v. Burt*, 11 D. 342, per Lord Moncreiff ; *Smith v. Robertson*, 10 Feb. 1826, 4 S. 442.

(a) *Whyte's Tr. v. Burt*, 13 Feb. 1851, 13 D. 679.

(b) *Ex parte James*, 8 Ves. 352.

(c) *Aberdeen Raily. Co. v. Blaikie Brs.*, 1 M'Q. 464. So in *ex parte Parks*, 3 M. D. & De Gex, 385, the Court of Chancery allowed the assignee of a bankrupt to relinquish the office, in order that he might bid at the sale of the bankrupt's estate ; and in a later

case, where the Court refused to allow the assignee to bid, he was permitted to name the price he would give if the property were not sold by auction, and afterwards to buy at that price (*ex parte Holyman*, 8 Jur. 156). See also *ex parte Gore*, 3 M. D. & De Gex, 77 ; 6 Jur. 1118 ; 7 Jur. 136.

(d) *Cochran v. Cochran*, 1732, M. 16388.

(e) *Gillies v. M'Lachlan's Reps.*, 11 Feb. 1846, 8 D. 487 ; see *Drysdale v. Nairne*, 28 Jan. 1835, 13 S. 348.

Purchases by
Trustees not
null, but re-
ducible.

cessors; the terms on which the sale will be reduced, and the limitation of the remedy arising from express or implied acquiescence.

It is quite a settled point, as we shall immediately see (a), that a contract of sale, though prohibited by the common law on any of the grounds above mentioned, is not void *ab initio*, but only voidable. The inference is obvious, that the purchaser's title will remain good until set aside in a process of reduction; and this accordingly was the form of procedure adopted in almost all the cases we have cited, certainly in every case in which it was sought to recover the property (b). On considering, further, that such purchases may be rendered perfectly valid, or at least unchallengeable, by the assent of all parties interested, we arrive at another general principle, namely, that a *reduction* will only be entertained when brought by some party who has an interest in the trust estate, or who is responsible for its administration. A bankrupt who has been charged to execute a conveyance to his trustee personally, may, it is true, try the question in a suspension (c); but it will be observed that purchases by trustees in bankruptcy are prohibited by statute; and we shall have to consider whether this statutory prohibition does not render the purchase an absolute nullity, in which case reduction would perhaps be unnecessary (d). A *recissory* process, however, must be resorted to when the purchase is to be declared void at common law; and if the transaction have already been implemented, the summons will conclude, not only for reduction of the minutes of sale, articles of roup, etc., but also of the disposition and sasine, or other title of constitution, and of all subsequent deeds of transmission (e). The summons may also embrace a conclusion for compensation or damages (f). Forms of issues adapted for trying the question of title will be found in the cases of *Gourlay's Trs. v. Kerr* (g), and *Elias v. Black* (h). Where the purchase has been made at a judicial auction, it would seem that any question as

(a) *Infra*, p. 372.

(b) See *Fraser v. Hankey*, 13 Jan. 1847, 9 D. 415; and cases formerly cited, *passim*.

(c) *Maxwell v. Drummond's Trs.*, 21 Jan. 1823, 2 S. 131.

(d) *Infra*, p. 376.

(e) *Ibid.*, *York Buildings Co. v. Mackenzie*, 3 Pat. 401 (judgment).

(f) *Balfour v. Kerr*, 20 Feb. 1856, 18 D. 620.

(g) *Gourlay's Trs. v. Kerr*, 6 June 1857, 19 D. 790.

(h) *Elias v. Black*, 18 D. 1227. See form of issue of damages in *Whyte's Tr. v. Burt*, 13 Feb. 1851, 13 D. 680.

to its legality may be competently raised in the depending process (a).

Among the parties who are considered to have a legal interest to reduce the sale, we may name the purchaser's *co-trustee* (b), because he is liable to be called to account for permitting the sale (c); the *debtor*, where the sale takes place under a power contained in a voluntary trust deed or heritable security (d), because a trustee for creditors is also a trustee for the debtor of the reversion (e); a *postponed* creditor (f); and also the general body of *creditors*, or a new trustee appointed to represent their interest (g). Lord Cuninghame thought that a bankrupt had no interest entitling him to challenge a sale to the trustee on his sequestrated estate, as the loss, if any, must fall exclusively on the creditors (h); but this view is scarcely in accordance with the precedent established in the analogous case of the ranking and sale of the estates of the York Buildings Company (i). It has been observed that a single creditor might competently insist, for his own interest, in a reduction of a sale to the trustee, if the majority had agreed to homologate the transaction without giving him due notice (k); but in an earlier case, it seems to have been doubted whether the instance of the representative of a creditor who was defunct was a sufficient title to sue (l). Lastly, it is settled that an unsuccessful bidder at the sale is entitled to pursue a reduction; and it would appear that he has an option either to reduce the whole transaction, or to claim the estate at the price he bid for it (m).

What parties
are entitled
to reduce the
Sale.

Where an action of reduction was directed against a purchasing trustee, and also against a co-trustee who was held to have been some-

No Action
against Co-
trustee unless
accessory to
the Purchase.

(a) *Darling v. Adamson*, 8 Dec. 1838, 1 D. 213.

(b) *Ibid.*

(c) See *Thorburn v. Martin*, 15 D. 848, per Lord J.-C. Hope.

(d) *Maxwell v. Drummond's Trs.*, 2 S. 130; *Jeffrey v. Aiken*, 16 June 1826, 4 S. 722.

(e) *Hamilton v. Wright*, 1 Bell, 590, per Lord Brougham.

(f) *Kerr v. M'Arthur's Trs.*, 23 Dec. 1848, 11 D. 302.

(g) *Whyte's Tr. v. Burt*, *supra*.

(h) *Fraser v. Hankey*, 9 D. 422; and see *ib.* p. 432, per Lord Fullerton.

(i) *York Buildings Co. v. Mackenzie*, 3 Pat. 378.

(k) Per Lord Wood, in *Thorburn v. Martin*, 15 D. 852.

(l) *Smith v. Robertson*, 10 Feb. 1826, 4 S. 444.

(m) *Abercrombie v. Burt*, 13 D. 682; *Faulds v. Corbet*, 25 Feb. 1859, 21 D. 587. *Infra*, p. 376.

what remiss in his duty, though not directly accessory to the illegal sale, the Court assuaged the co-trustee, but found him entitled only to modified expenses (a).

We shall merely cite two cases (b) in which proceedings were taken against trustees for sale by petition and complaint. The whole subject of the removal of trustees is reserved for a subsequent chapter.

Beneficiary may either ratify the Sale or demand a Reconveyance or Resale.

As to the terms on which an illegal purchase will be set aside, it appears that the practice of our Courts leaves a certain option to the aggrieved party. For, in the first place, the beneficiary may compel the trustee to carry out the arrangement, if it turns out to be for the benefit of the estate. "The result of a trustee purchasing property," said Lord Cockburn, "is that the transaction is voidable, not that it is void. If it be chosen, he may be kept to his bargain" (c). Or, secondly, the constituent may demand a conveyance of the estate, subject to the payment of the price, on the principle that the acquisition was a constructive trust for his behoof. On this principle, where the law agents and trustees of a heritable creditor purchased the subjects over which their client's security extended, the Court ordained the trustees to convey the property to their client, the pursuer of the action (d). Lastly, the constituent may repudiate the transaction altogether and insist upon a resale.

Is the Beneficiary bound to accept a Reconveyance when he does not allege damage?

It will generally be for the interest of the trustee, or purchaser, to offer to execute a *reconveyance* of the property, as by this method he will get back the purchase-money, and escape from all further liability; while, in the alternative case of a *resale*, he might be obliged to make good the difference between the selling price and that which he had previously given (e). Where the power of selling was in the purchaser himself (as in a sale by a heritable creditor to himself), the Court has been satisfied with the offer of a reconveyance (f); as in that way the *status quo* as between debtor

(a) *Thorburn v. Martin*, 8 July 1853, 15 D. 845.

(b) *Drew v. Paterson*, 2 Dec. 1825, 4 S. 259; *Brown v. Burt*, 23 Dec. 1848, 11 D. 338.

(c) *Thorburn v. Martin*, 15 D. 850.

(d) *Gillies v. MacLachlan*. See the interlocutor, 8 D. 508.

(e) See *infra*, p. 376.

(f) *Maxwell v. Drummond's Trs.*, 2 S. 132; *Taylor v. Watson*, 8 D. 403. See the interlocutor, *Darling v. Adamson*, 1 D. 213.

and creditor is restored; and because it would be unreasonable to compel the creditor against his will to exercise the powers of sale, which were conferred solely for his own benefit. And accordingly, where creditors (defenders) offered to abandon the sale, and to account for their intromissions with the subjects, upon receiving payment of their debts with the accruing interest, the Court remitted to an accountant to make up a state of the balance between the defender and pursuer, holding them still to stand in the relation to each other of creditor in possession and debtor (a). Where, again, the complaint is, that the property has been purchased by a private trustee or agent employed in the sale, the object of the pursuer generally is to recover the specific subject, on the ground that it has been sold below its value; and the proper course would appear to be simply to reduce the sale, by which means the pursuer is at once reinvested in his property (b). It is clear that the beneficiary is always entitled to claim a specific reconveyance.

The beneficiary will be entitled to recover, along with the property, the rents and profits uplifted during the purchaser's possession; and he will of course be liable for the price (c). In *Mackenzie's* case, the judgment of the House of Lords contained an elaborate series of findings in relation to the mutual claims of the parties against each other. It declared that the defender ought to refund to the company all the rents and profits he had received out of the estate, and an adequate consideration for the enjoyment of such part thereof as he had occupied himself. The pursuers, on the other hand, were found liable in repayment of the price, and also of all sums expended on the permanent improvement of the property; and an account was directed to be taken of the defender's receipts and disbursements, in which periodical interest was to be allowed on both sides to the date of the decree. And it was ordered that, on payment of the balance found due by either party, "the defender do reconvey the said estates to the pursuers, subject to the demands of their creditors, and to the leases and other contracts as aforesaid, in such manner as the Court shall think fit to direct" (d). In a

Rents and
Profits of pos-
session.

(a) *Taylor v. Watson*, *ubi supra*.

(b) See *Gourlay's Trs. v. Kerr*, 6 June 1857, 19 D. 789.

(c) *York Buildings Co. v. Mac-*

kenzie, 3 Pat. 401; *Maxwell v. Drummond's Trs.*, 2 S. 182; *Elliott v. Wilson*, 4 S. 481.

(d) 3 Pat. 402.

subsequent appeal, their Lordships affirmed the decision of the Court of Session, fixing 5 per cent. as the rate of interest chargeable on each side of the account (a). We have thought it desirable to state thus fully the terms of Lord Thurlow's final judgment, because Lord Brougham, in referring to this celebrated case, fell into the mistake of supposing that the maxim, *bona fide possessor fructus perceptos et consumptos suos facit*, was given effect to in the ultimate decision (b). A trustee purchasing the trust estate cannot be regarded as a *bona fide* possessor. But a stranger purchasing from one who is guilty of a breach of trust in selling, is entitled to the benefit of this equitable principle (c).

Trustee
entitled to
deductions for
Outlay and
Meliorations.

The trustee will be allowed the cost of any permanent improvements or meliorations which he may have undertaken *bona fide* (d), including even such ornamental improvements as enclosing and planting, and the cost of building a new mansion-house and lodge, laying out shrubberies, etc. (e). But it appears from the tenor of Lord Brougham's observations in the *Aberdeen Railway* case (f), that such claims are only sustained out of favour to parties who have purchased in ignorance of the law; and not therefore to be extended without reservation to fraudulent purchasers. This is also the view taken by the English Courts of Equity, who, in cases of actual fraud, will make allowance for necessary repairs, but not for improvements (g). If the property have *deteriorated* during the possession of the trustee, it is held in England that the purchase-money due to him must suffer a proportionate abatement (h).

Can the Estate
be claimed
from a Party
purchasing
bona fide from
a fraudulent
Purchaser?

No positive rule appears as yet to have been laid down regarding the liability of *bona fide* onerous purchasers from fraudulent trustees. In *Elliott v. Wilson* (i), which was a reduction by a substitute heir

(a) 3 Pat. 579.

(b) See his Lordship's observations in *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 478.

(c) *Cleghorn v. Elliott*, 10 June 1842, 4 D. 1389. As to this doctrine, see Ersk. 2, 1, 25; and Dict. voce *Bona fide Consumption*; *Hamilton v. Chancellor*, 13 Nov. 1833, 12 S. 22.

(d) *York Buildings Co. v. Mackenzie*, 3 Pat. 402; *Elliott v. Wilson*,

4 S. 432; *Jeffrey v. Aiken*, 4 S. 724; *Gillies v. MacLachlan*, 8 D. 508.

(e) *York Buildings Co. v. Mackenzie* (2d Appeal), 14 June 1797, 3 Pat. 579.

(f) 1 Macq. 479.

(g) *Kenney v. Browne*, 3 Ridg. 518, per Lord Fitzgibbon; *Bough v. Price*, 1 Wils. 320.

(h) *Ex parte Bennett*, 10 Ves. 400.

(i) *Elliott v. Wilson*, 1 Apr. 1828, 3 W. & S. 60, affg. 4 S. 429.

of entail of a judicial sale of land for the redemption of the land-tax, the defence was, that Wilson had purchased *bona fide* from the purchaser at the sale. But as it appeared that the statutory requisites of a legal sale had not been complied with, the Court reduced the whole transaction. As to the purchaser's claim for repetition of the price *bona fide* paid, the principle of the decision seems to be, that he was entitled to recover it, in so far as the rightful owner was *lucratus*. On the general question of the liability of onerous purchasers, the cases of *Anderson v. The Bank of Scotland* (a) may be consulted; from which (and especially the last of the two cases) we may infer, that a singular successor purchasing or lending money on heritable security, without notice of a trust, is safe unless the vendor's title be absolutely null. In the class of cases we are considering, the titles may or may not disclose the fiduciary character of the first purchaser. If the circumstances do not disclose a trust, it appears, on the authority of *Fraser v. Hankey* (b), that the title of onerous creditors will not be disturbed; and, on the other hand, it may be presumed that a purchaser *with notice* will be bound by all the objections competent to be urged against his author.

If the property illegally purchased is part of a sequestrated estate, or of an estate held in trust for creditors, the proper course will be to apply for a warrant for a *resale* of the property, instead of a reconveyance. The only notice we have regarding proceedings of this nature, occurs in the report of *Burt's* case, already referred to (c). Burt, the trustee on White's sequestrated estate, sold the lands of Arngask by public roup to his own son. Anderson, a competitor in the bidding, objected to the purchase as illegal; in consequence of which, a petition and complaint was presented to the Court by a number of the creditors, praying for the removal of Burt from the office of trustee. Burt thereupon resigned, and the Court found him liable in the expenses of the application, adding a finding to the effect that the purchase was illegal, and "that the said purchase, when objected to, cannot receive the sanction of the Court."

Resale under
Judicial Au-
thority.

(a) *Anderson v. Bank of Scotland*,
29 May 1841, 3 D. 968; and 7 June
1842, 4 D. 1374.

(b) *Fraser v. Hankey*, 9 D. 422,
423.

(c) *Brown v. Burt*, 11 D. 338;
Abercrombie v. Burt, 13 D. 679.

With reference to this finding, we may remark that the case of a purchase by a trustee, commissioner, or adjudger in bankruptcy, forms apparently an exception to the rule which prevails in similar cases, namely, that purchases by trustees are not *ab initio* void. It would rather seem that, inasmuch as the Legislature has declared that it shall not be *lawful* for any of these persons to purchase (a), the transaction may be treated as altogether nugatory; though, of course, it would be proper to bring it under the cognizance of the Court. This view of the matter appears to have been taken in *Burt's* case; for no reduction of the sale was brought, and the new trustee, relying apparently on the declaration of the Court, proceeded to effect a resale of the property, of which Burt became the purchaser again, but at a lower price (b). It appears from the report of the later proceedings in the *York Buildings* case, after the case went back to the Court of Session, that a new common agent was appointed, and a resale carried through by authority of the Court (c).

Measure of
Damages.

We have seen that a trustee will be liable in damages to the beneficiary for attempting to purchase the estate. In *Burt's* case, the damage was assessed at the difference betwixt the price ultimately obtained and the highest sum offered by a *bona fide* purchaser at the first sale (d). In *Elias v. Black*, damages were not claimed; the reductive issue for one of the pursuers, a mortgagee, was negatived on the ground that no actual loss was proved to have been sustained (e). In *Cree v. Durie* (f), the auctioneer was found liable in damages to a bidder, for purchasing the property for himself.

Remedies of
competing
Purchasers.
Reduction of
previous offers.

Where there has been competition at an auction, the appropriate remedy may be neither by a resale of the property, nor yet by a reconveyance from the purchaser, but by an action for enforcing the contract *as a sale to the other bidder*. Thus, where one of two trustees tendered an offer for the estate, which his co-trustee and their constituent refused to entertain, and the trustee who had

(a) 19 & 20 Vict. cap. 79, § 120.

(b) It must be remarked, however, that a sale to a bankrupt's trustee has been sustained after long possession (*Fraser v. Hankey*, 9 D. 415).

(c) *York Buildings Co. v. Bremner*,

6 July 1796; *affd.* 19 June 1797, 3 Pat. 586, 587.

(d) *Abercrombie v. Burt*, 13 D. 679.

(e) *Elias v. Black*, 18 D. 1227.

(f) 16 F.C. 66; Br. Sup. 581.

made the offer refused to concur in granting a title to a *bona fide* bidder, pretending that the lands had been sold to himself, the Court decerned against him in an action of implement at the instance of his constituent and co-trustee (*a*). In another case, where action was brought by the competing bidder, the Court sustained the relevancy of the summons, which concluded for reduction of all offers subsequent to the first, for declarator that the lands had been effectually sold to the pursuer at the upset price, and for decree ordaining the trustees, expositors of the property, to grant the pursuer a disposition on his making payment of the same (*b*). But a preceding offerer will not be bound to take the estate, unless he claims it, where there has been illegal competition; fairness being of the essentials of the contract (*c*).

Purchases by trustees may be validated either by actual concurrence on the part of the beneficiary (*d*), or by homologation (*e*). Homologation by a beneficiary of deeds prejudicial to his interests, is of course an effectual bar to any challenge on his part; but the law will not easily presume that a party has consented to injustice; and in order that such consent may be effectual, the party must at the time have been *sui juris* (*f*), not ignorant of his rights (*g*), and fully aware of the exact nature of the transaction (*h*). A mere *non repugnantia* is not sufficient homologation (*i*). But a letter authorizing the trustee to proceed with the sale, and promising not to challenge it, is binding (*k*); and where a bankrupt had been present at the sale of his estate, and had acted as attorney for the trustee when infetment was given him on his purchase, and concurred with the creditors in a petition for the trustee's exoneration and discharge, the Court unanimously assoilzied the trustee from a reduction at the instance of the heir of the bankrupt (*l*). Lord Pres. Boyle, having

Homologation
of the trans-
action by the
Beneficiaries.

(*a*) *Brisbane's Trs. v. Crawford*, 3 F. C. 178; M. Ap. Deathbed, No. 6; Feb. 1826, 4 S. 422.

(*b*) *Faulds v. Corbet*, 21 D. 588, 900.

(*c*) *Anderson v. Stewart*, 18 Dec. 1822, 1 S. Ap. Ca. 169.

(*d*) *Browning v. Watt*, 25 May 1837, 15 S. 999.

(*e*) *Fraser v. Hankey & Co.*, 9 D. 415.

(*f*) *Irving v. Tail*, 3 June 1808, 14

F. C. 178; M. Ap. Deathbed, No. 6; *Brodie v. Brodie*, 6 July 1827, 5 S.

900.

(*g*) *Duke of Gordon v. Innes*, 5 July

1822, 1 S. Ap. Ca. 169.

(*h*) *Thorburn v. Martin*, 15 D.

845.

(*i*) *Taylor v. Watson*, 8 D. 404.

(*k*) *Duff v. Gorrie*, 23 May 1849,

11 D. 1054.

(*l*) *Fraser v. Hankey*, 9 D. 415.

cited Sir Edward Sugden and reviewed the whole of the English decisions, said he held it established by these authorities, that *long delay* (a) or *acquiescence* was a sufficient ground for refusing the interposition of a Court of Equity to relieve from a purchase made by a trustee or solicitor in bankruptcy (b). It may be mentioned that in this case the bankrupt had also taken a *lease* of part of the estate from the trustee, and lived on the estate for thirty-nine years before the challenge.

But a majority
cannot bind
the rest.

Where the beneficiaries consist of a class of persons, as creditors, or partners of a firm, the sanction of the majority will not bind the rest (c); at all events, the right of an individual partner to challenge an illegal sale cannot be taken away, unless he has had notice of the intention to call a meeting for the purpose of ratifying the transaction (d).

Mora.

Lastly, a beneficiary seeking legal redress must make his application within reasonable time. What is to be considered reasonable time, will depend entirely upon circumstances; as the Court have no authority to limit the right of action to any period short of the long negative prescription. In *Fraser v. Hankey* (e), relief was refused after *thirty-nine* years of acquiescence; and we have seen that Lord Pres. Boyle gave great weight to the English decisions on the subject of acquiescence. A summary of these will be found in his Lordship's opinion (f), and in Mr Lewin's work (g). It is obvious that the defence of *mora* can only be effectually pleaded where the pursuer has been cognizant of the transaction, and in the possession of means for vindicating his rights. The sale of the estates of Seaton was set aside after Mr Mackenzie had been in possession for thirteen years (h). Lord Loughborough said it was impossible to impute laches to the Company so long as Mr Mackenzie continued to act as their agent, and while his accounts were unsettled; illustrating his opinion by the case of a gentleman who finds that he has been deceived by his steward, in which case, if he continues to employ him for years, he is not at liberty to call

(a) Part III.; Beneficiary's right of action. 1847, 9 D. 415; *Robertson v. Scott*, 3 July 1834, 12 S. 875.

(b) 9 D. 427.

(f) 9 D. 425, *et seq.*

(c) *Thorburn v. Martin*, 15 D. 845.

(g) Lewin, Tr., 4th Ed. 343.

(d) 15 D. 852, per Lord Wood.

(h) *York Buildings Co. v. Mackenzie*, 3 Pat. 378.

(e) *Fraser v. Hankey*, 13 Jan.

him to account for his former conduct; but if he dismisses him after coming to the knowledge of his conduct, he may do so (a). In two later cases, twelve years' (b), and even thirty-two years' delay—explained by absence on foreign service (c),—were held insufficient to bar a challenge at the instance of the beneficiary (d).

(a) 3 Pat. 401.

(b) *Jeffrey v. Aiken*, 16 June 1826, 4 S. 722; *Taylor v. Watson*, 20 Jan. 1846, 8 D. 400.

(c) *Gillies v. Maclachlan*, 8 D. 487.

(d) In a note to the first volume of Mr M'Queen's Reports (p. 481) the legal profession in Scotland are obligingly reminded of the case of the *York Buildings Co.*; and informed, on the authority of "Mr Forsyth's learned work on the Law of Trusts in Scotland," that this great case, which, it seems, has always been regarded as a ruling authority in England, is comparatively forgotten in the country from whence

it came. The foregoing review of the Scotch case law on purchases by trustees—which, for the purposes of a practical treatise, is perhaps unnecessarily copious, considering that the law is now so well settled and understood—has at least a historical interest; illustrating as it does the gradual expansion of the principle of "constructive trust," which has ultimately been applied to all descriptions of contracts in which the trustee has a conflicting interest with that of the trust estate. See on the doctrine generally, Chapter XI. and Chapter XII. Section I.

CHAPTER XVIII.

OF THE DUTIES OF TRUSTEES UNDER TRUSTS FOR THE EXECUTION OF DEEDS OF ENTAIL.

THE only class of duties peculiar to the fiduciary administration of real property not embraced in the previous chapters, is that of the execution of trusts for the management of heritable property, with the view to its ultimate settlement upon heirs of entail.

Reasons for
resorting to a
Trust.

The interposition of a trust in such cases is resorted to, either for the purpose of clearing the estate from incumbrances, or with the view of accumulating the rents for a certain period, and appropriating the proceeds either to the purchase of additional lands to be entailed on the same order of heirs, or in raising provisions for the younger members of the family. In the present chapter, we shall notice some points of difficulty in the execution of such powers; and chiefly with reference to the two following heads:—*1st*, What is necessary to be done in order to the perfecting of the settlement; and *2dly*, As to the disposal of accumulated rents, proceeds of the sale of heritable estate under powers, and other funds not specially appropriated by the truster.

SECTION I.

OF THE EXECUTION OF THE SETTLEMENT.

Before proceeding to carry out a purpose of conveyance, especially if involving the execution of an entail, trustees ought to satisfy themselves not only of the sufficiency of their own title to administer (*a*), but also that the estate is in a position to warrant them

(*a*) See Chapter XXI. Section III., as to the trustee's powers.

in denuding with safety, so as to obviate the possibility of any after claim, either at the instance of creditors, or of the trustor's heirs.

On the subject of liability for entailor's debts, the leading authorities are *Vans Agnew v. Stewart*, and the *Clanranald* case, which is also a leading authority on the nature of the *jus crediti* conferred by marriage-contract (a). But the only point in the case which we require to notice, is the decision finding that a trust for the payment of debts is not incompatible with the existence of a valid entail over the same lands; and that, upon the trustees denuding, after the trust purposes have been fulfilled, the entail will be effectually disburdened. It is obvious that the payment of the trustor's debts, must in every case form a preferable burden upon the estate; and the fact that the estate has been exhausted in payment of debts, will be a good answer to an action for implement (b). On the other hand, the execution of a direction to entail the proceeds of trust estate will not warrant a reduction at the instance of creditors under the Act 1681, cap. 18; for trustees under a general settlement cannot be regarded as conjunct and confident persons in the sense of the statute, they being as truly bound to protect the interests of creditors, as to carry into effect the ultimate purposes of the destination (c). In the event of their neglecting the duty they owe to the trustor or his creditors—as, for example, by executing an entail without providing for preferable burdens (d), by neglecting to record the entail (e), or otherwise putting the estate within the control of the institute, without securing the interests of the heirs in the destination (f),—the trustees incur a personal responsibility for the consequences of their negligence.

Payment of
Entailor's
Debts.

If the interests of the heir-at-law are affected by the trust, he is entitled to exhibition of the documents constituting the trustee's title; and it is for the interest of the trust that he should have an

Heir entitled
to exhibition
of the Trust
Deed.

(a) *Vans Agnew v. Stewart*, 31 July 1822, 1 S. Ap. Ca. 320; *Herries, Farquhar & Co. v. Brown*, 10 Mar. 1838, 16 S. 948; *Mitchell v. Tarbutt*, 4 Feb. 1809, F. C.

(b) *Paul v. Paul's Trs.*, 5 July 1821, 1 S. 100. But see *E. of Leven & Melville v. Cartwright*, 12 June 1861, 23 D. 1038.

(c) *Young v. Darroch's Trs.*, 23 Jan. 1835, 13 S. 305.

(d) *Parker v. Anstruther*, 5 Nov. 1853, 16 D. 17; *Cruikshank v. Cruikshank*, 24 Apr. 1845, 4 Bell, 1845.

(e) *Brock v. Speirs*, 10 June 1845, 7 D. 863, per Lord Pr. Boyle.

(f) See *Dalrymple v. Ranken*, 23 Dec. 1836, 15 S. 309, per Lord Gillies.

opportunity of considering and vindicating his position as heir ; for, in the event of any failure or imperfection in the statement of the purposes, he is in law entitled to the beneficial interest to the extent of such deficiency. It was at one time considered, on the authority of the case of *Cathcart v. Earl of Cassillis* (a), that as the heir's interest was *prima facie* excluded by a settlement unreduced, he could have no title to sue for exhibition *ad deliberandum* ; but this doctrine was exploded by the decision of the Second Division in *Liddell v. Wilson* (b), where the majority of the judges came to the very obvious conclusion, that the heir-at-law is entitled to inspection of the documents found in his ancestor's repositories, were it only for the purpose of ascertaining whether the settlement founded on does in reality exclude his interest, and whether the interest of the trustees be not also excluded by some later settlement in his favour.

Power ought to be narrated.

As to the execution of powers of entailing, it is proper, in point of style, that the deed should commence with a narrative of the power in pursuance of which it is to be granted. This is the more necessary when the power is conferred by private Act of Parliament, which does not enter the Register of Sasines. The narrative, however, is by no means essential ; and it would be immaterial though it were shown in the most conclusive manner, that the donee of the power had no recollection of the settlement in which it was contained, and supposed himself to be acting under some other authority (c).

Trusts for the execution of imperfect Entails defeasible under 11 & 12 Vict. c. 36.

The execution of trusts for the creation of imperfect entails is liable to be defeated by the operation of the 43d clause of the Entail Amendment Act (d), which, after enacting that entails defective in regard to any one of the prohibitions required by the statute of 1685 shall be deemed and taken to be invalid and ineffectual as regards

(a) *Cathcart v. Earl of Cassillis*, 1795, M. 3993 ; Bell, Fol. Ca. 143 ; 31 May 1825, 1 W. & S. 265 ; *Douglas v. Holmes*, 19 July 1854, 16 D. 1116 ; *Wilson v. Gilchrist's Trs.*, 11 Feb. 1851, 13 D. 636.

(b) *Liddell v. Wilson*, 19 Dec. 1855, 18 D. 274.

(c) Per Lords Brougham and Campbell, in *Cunninghame v. M'Leod*, 12

Aug. 1846, 5 Bell, 252, 257. So also a general disposition or testament is a good exercise of a power of disposal, although the power be not narrated. See cases noted in Chapter XXII. Sec. III.

(d) This section has no retrospective operation ; *Urquhart v. Urquhart*, 1 M'Q. 658. See remarks on § 26, *infra*.

all the prohibitions, goes on to declare that, "where any money or other property, real or personal, has been or shall be invested in trust for the purpose of purchasing lands to be entailed, or where any lands are or shall be directed to be entailed, but the direction has not been carried into effect, such trust money or other property, and such lands, though still unentailed, may be dealt with under this Act in all respects as such lands might have been dealt with if entailed in terms of such trust or directions." The meaning of the proviso evidently is, that when property is held in trust, subject to the conditions of an imperfect entail, the right of the beneficiaries is reduced to that of heirs under a simple destination. The prohibitions are destroyed by the force of the statute, and the duty of the trustees is to execute an unconditional conveyance in favour of the heirs of the destination, under which the institute will be in a position to defeat the substitution by gratuitous alienation.

It is remarkable, that in the case of *Cameron's Trs. v. Cameron* (a) (which appears to have been carefully considered), this statutory provision should have been altogether ignored. The trustor directed the residue of his means and estate (including his estate of Barcaldine) to be settled upon a series of heirs in the nature of a tailzied destination, but without making use of the word "entail" or its Scottish equivalent; and he further directed his trustees, after the lapse of five years from his death, to dispoise, convey, and make over the residue to the heirs of the destination, "but that always under the denomination and destination above written, and with such restrictions and limitations as may effectually prevent the order of succession above set forth from being altered or destroyed." The First Division (altering the Lord Ordinary's interlocutor) found, that under the settlement "the trustees are not directed or authorized to insert in the disposition and conveyance of the estate of Barcaldine, which ought now to be executed by them in conformity therewith, any prohibitions or restrictions against sales of the estate and contraction of debt." As the 43d clause of the Entail Amendment Act was not pleaded, no opinion was expressed as to whether the trustees were bound to insert a prohibition against altering the succession, as required by the trustor; and perhaps the point is not very material, as such provisions,

*Cameron's Trs.
v. Cameron.*

(a) *Cameron's Trs. v. Cameron*, 14 Dec. 1860, 23 D. 167.

In dubio, the direction should be literally carried out.

if inserted, would be inoperative. However, the mere circumstance that the direction to execute an entail was coupled with conditions apparently inconsistent with the maintenance of an effectual and binding settlement under the statute 1685, cap. 22, or proceeded from a party who had himself possessed on a limited title, would not justify trustees in refusing to carry the purpose into execution; for their duty is to carry out the direction as it stands, leaving the validity of the conveyance to be determined in an action at the instance of those who have an interest in challenging it (a). If the direction were ambiguous, it might be necessary to institute an action of declarator for the purpose of ascertaining the terms in which the settlement ought to be conceived. The reports furnish many examples of actions of this nature; and the clauses appropriate to entails executed in pursuance of powers have now to a considerable extent been settled by decision (b).

Trust to entail on the Settlor's Heirs-at-law.

It is very evident that a direction to trustees to convey under such conditions or fetters, or in such a form of destination, as do not, according to the law of Scotland, constitute an effective entail, will not be a sufficient authority to the trustees to execute a strict entail. The mere presumption arising from the use of the word *entail* is not sufficient to override a positive direction to execute a deed, in terms which are not in accordance with the requirements of the statute 1685. The principle is illustrated very clearly by the *Dalswinton* case, one of the most recent decisions on the powers of trustees charged with the execution of entails. The important words of the direction were,—“That the said estate, when purchased, shall be made over by a deed of entail, according to the formalities necessary in such cases in Scotland, to be enjoyed by my said nephew, Lieutenant James Macalpine, and his lawful heirs for ever, in regular succession.” An action was brought by the institute, to have it declared that he was entitled to a conveyance in fee-simple, on the ground that a destination to heirs whatsoever was not the subject of an entail according to the law of

Lenny v. Lenny.

(a) *Graham v. Stewart*, 14 June 1855, 15 D. 558; *Dunlop v. Crawford*, 26 May 1849, 11 D. 1062; *Lenny v. Lenny*, 28 June 1860, 22 D. 1272. See *infra*, pp. 389–90.

(b) The Court will not give an

opinion upon the terms of an entail already executed; but will grant decree of exoneration in an action directed against the heirs-substitute of entail (*Farquharson v. Earl of Morton*, 15 May 1828, 6 S. 796).

Scotland. The trustees, while disputing this proposition, maintained that they were entitled to insert a clause excluding heirs-portioners (which would have made a good entail), and they relied on an expression in the will to the effect that the estate should be "incapable of being divided." It had been held in former cases, that the exclusion of heirs-portioners was a clause of ordinary style, and might be inserted in the absence of any special direction on the subject. But in this case it was held, that the intention of the testator was to entail the estate on the heirs-at-law; and as the whole Court were of opinion that a valid entail could only be constituted in favour of *personæ dilectæ*, the judgment was given in favour of the institute (a).

From the tenor of the last-mentioned decision, it is sufficiently obvious that an essential element of every power of entailing consists in the specification of an arbitrary order of succession. "There can be no reasonable doubt," said the Lord Justice-Clerk (b) in the leading opinion, "that prior to the Act concerning tailzies, that term meant an instrument of conveyance by which an estate was settled on a selected and specified series of heirs; and therefore, when the Parliament of Scotland, in 1685, 'statutes and declares that it shall be lawful for his Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies,' . . . etc., it seems impossible to give the term tailzie in the statute any different or wider meaning than it had in the older law (c).

Arbitrary Destination essential to the constitution of an Entail.

As trusts to entail are of the class of executory trusts, all matters of form or detail may be left to the trustee's discretion. A general direction to settle the property in the form of a *strict entail* will be sufficient, and will override other words that might be supposed to point to a simple destination (d). In the case of *Forrest's Trs. v. Forrest* (e), directions to execute a *regular and valid entail* in favour of certain parties in succession, and the heirs whatsoever of their

Executory Trusts for the creation of Entails.

(a) *Leny v. Leny*, 28 June 1860, 22 D. 1272; *Cameron's Trs. v. Cameron*, *supra*.

(b) Lord Glenconce, 22 D. 1288.

(c) In the subsequent case of *Gordon's Trs.* (Feb. 1862), the First Division in effect decided that an entail

could not be created in favour of the legal order of succession, with a proviso excluding heirs-portioners.

(d) *Forsyth v. Ferguson*, 14 June 1832, 10 S. 646.

(e) *Forrest's Trs. v. Forrest*, 14 Dec. 1845, 8 D. 304.

bodies—in the cases of *M'Allister* and *Macpherson* (a), that the lands were *to be entailed*, and in other cases, that the titles should be taken in favour of the *same series of heirs, and under the same limitations and irritancies* (b), were held sufficient. But the selection of a particular order of heirs, being matter of substance and not of form, is not discretionary; and though it is possible to figure a power so framed as to leave the selection of the favoured heirs to trustees, no example of such a power is to be found in the reports. If certain heirs are specified in the power, the deed must be executed in favour of them, and of no others. Accordingly, where the direction was to entail lands in favour of four persons and their respective heirs-male, who were substituted successively in the destination, the Court would not allow the trustees to insert a general destination over to the heirs and successors of the institute, although there were expressions indicative of such an intention in the settlement. On this point Lord Cuninghame observed, “Now that there is no necessity for excluding the claims of the Sovereign as *ultimus hæres*, there seems no occasion for an ultimate destination to the heirs-general of anybody; and as such heirs could never be placed *in obligatione*, or so called as to have any *jus crediti*, it appears better to the Lord Ordinary that the destination should stop where the instructions of the truster stop, which would leave the fee-simple succession where it is thought it would be most justly left,—to the heirs whatsoever of the last special substitute” (c).

Power to entail
never implied.

A power of entailing will not be implied from incidental expressions indicative of a desire that the estate should remain in the family. For example, in the case of *Duthie v. Duthie* (d), while there was no injunction to entail the estate, the trustees were directed to convey to a specified series of substitutes, under a declaration, that if any of the heirs should sell the estates, they should be bound to invest a certain part of the price, the accumulated interest of which should follow the destination of the estates. The Court held that the heirs-substitute took the estate as fee-simple proprietors, and were under no obligation

(a) *M'Innes v. M'Allister*, 29 June 1827, 5 S. 862; *Macpherson v. Macpherson*, 11 June 1852, 1 M'Q. 246.

(b) *Moncreiff v. Menzies*, 25 Nov. 1857, 20 D. 95.

(c) *Campbell's Trs. v. Campbell*, 12 May 1838, 16 S. 1006.

(d) *Duthie v. Duthie*, 25 Feb. 1841, 3 D. 616; see *Stewart's Trs v. Stewart*, 20 Dec. 1851, 14 D. 298.

to reinvest the proceeds of the sale of the estate in terms of the trust.

It has been settled by several concurring decisions, that trustees are bound to insert a clause excluding heirs-portioners in pursuance of a general direction to execute a "regular and valid entail," or to settle property in "strict entail" on a specified order of heirs (*a*). In connection with this point we may refer to the case of *Martin v. Kelso*, in which judgment was given by the House of Lords, affirming the decision of the Court of Session, on the construction of a power reserved to the heirs-substitutes, "so often as their presumptive heirs were females," so to alter the succession as "to settle the estate upon a younger daughter in preference to an elder daughter." Under this power, the heir in possession was held entitled to call the younger of his sisters in preference to the elder (*b*).

In direction to Entail, exclusion of Heirs-portioners implied.

In the interpretation of trusts for the execution of entails, the Court acts upon the maxim that the intention of the settlor is to be carried into effect, as distinguished from the rule of strict construction. Thus a direction to impose fetters upon the "heirs" of the destination is held to embrace the institute; and the distinctions laid down in the *Duntreath*, *Seaforth*, and similar cases, are not recognised. This point was decided in *Forbes v. Forbes* (*c*), by the First Division, in an action of declarator instituted by the judicial factor on the settlor's estate. In the following year the Second Division sustained an entail to which the objection had been taken, that the trust enjoined the imposition of irritant and resolute clauses upon the whole heirs of entail, without making mention of the institute (*d*).

Rule of Liberal Construction applied to Trusts for the execution of Entails.

To this principle we may refer the doctrine established by the Court of Session, that a particular enumeration of prohibitions following a general direction, when occurring in a trust, is not taxative but demonstrative. This principle of interpretation here is clearly at variance with the canon of strict construction applied to other branches of entail law; it is perhaps more lax than anything known in the construction of wills, in which the rule is, that

General direction to impose Fetters followed by incomplete enumeration.

(a) See *Sprot v. Sprot*, 22 May 1828, 6 S. 833; *Forrest's Trs. v. Forrest*, 14 Dec. 1845, 8 D. 304.

(c) *Forbes v. Forbes*, 5 July 1853, 15 D. 809.

(b) *Martin v. Kelso*, 21 Mar. 1857, 2 Macq. 556, affg. 15 D. 950.

(d) *Seton v. Seton*, 1 Mar. 1854, 16 D. 658.

words of enumeration are to be held as limiting the operation of a general clause to matters of the same *species*. But whatever the explanation may be, it is quite settled that the force of a direction to execute an effectual entail is not destroyed in consequence of an incomplete enumeration of clauses, prohibitory, irritant, or resolute, coupled with more comprehensive words, such as, "other clauses and conditions necessary and proper for carrying the maker's intention into effect" (a), or "usual irritant and resolute clauses" (b). The latest cases are *Stirling v. Stirling's Trs.*, and *Seton v. Seton*. In both there was a general direction, accompanied with an enumeration of prohibitions, which did not include a prohibition against altering the order of succession. The ground of decision in the last case, as expressed by Lord Cockburn, was, "a reluctance to hold the expression of his (the testator's) anxiety about the insertion of the usual irritant and resolute clauses, to imply that he meant to recall the previous direction to make a good entail, which good entail necessarily supposes the operation of a prohibition against altering the destination."

Incomplete enumeration not fortified by general direction.

An incomplete enumeration of fetters in a power of entailing, if not fortified by a general direction, is fatal to the intention; for the Court will not permit the insertion of other fetters than those specified in the power (c). And, therefore, although a direction to entail on a certain series of heirs is an authority to execute a strict entail, a direction to entail on such heirs with such prohibitions as may prevent the order of succession from being altered, is a mere destination (d). And so, where trustees were directed to denude of the residuary estate, with such conditions that the heirs should not dispose of the same, nor alter the succession thereof, either gratuitously or onerously, the Court would not sanction the insertion of a clause prohibiting the contraction of debt (e). And where powers were reserved by marriage-contract to make an entail prohibiting alienation and the contracting of debt (f),

(a) *Stirling v. Stirling's Trs.*, 30 Nov. 1838, 1 D. 130.

(b) *Seton v. Seton*, 1 Mar. 1854, 16 D. 658.

(c) *M'Innes v. M'Allister*, 29 June 1827, 5 S. 862; *Macpherson v. Macpherson*, 11 June 1852, 1 M'Q. 246.

(d) *Cameron's Trs. v. Cameron*, 14 Dec. 1860, 23 D. 167.

(e) *Cuming's Trs. v. Cuming*, 10 July 1832, 10 S. 804.

(f) *Macneill v. Macneill's Trs.*, 27 Jan. 1826, 4 S. 393.

or, as in another case, prohibiting alteration of the succession and contracting of debt (a), the Court would not allow the omitted prohibition to be inserted in the entail.

It not unfrequently happens that a testator, desirous of bringing new lands within the fetters of an existing entail, leaves a direction to his trustees to entail such lands upon the *same series of heirs*. A request to this effect is equivalent to a direction to execute a strict entail in their favour. Accordingly, it was held, that although the testator, after the execution of the trust settlement, had executed a second entail altering the destination, the trustees were bound to follow implicitly the directions of the settlement, and therefore to entail the newly acquired lands on the heirs called to the succession by the first entail (b).

"Same series of Heirs" as in existing Entail.

In *Mackintosh v. Mackintosh* (c), trustees were directed to apply the residue of the testator's estate in purchasing lands, taking the conveyance thereof to the heirs of entail specified in a former deed of entail executed by himself, with the proviso that "the dispositions and conveyances to be granted to the said heirs of entail, and the infestments thereon, shall contain, and shall be always with and under the conditions, provisions, restrictions, limitations, exceptions, and clauses irritant and resolute, declarations and reservations, used in the said deed of entail executed by myself." The irritant clause of the entail there referred to, struck at the contravention of the prohibitions by "all deeds or acts contracted," etc., but did not expressly refer to debts, which rendered it doubtful whether the irritancy could be construed in such a manner as to apply to the contracting of debt. With the view of making the entail more secure, the trustees inserted the word debts in the irritant clause; but the Court found, in an action brought by the heir in possession, that they had exceeded their power, and reduced the deed in so far as it differed from the style of the original entail. Trustees are not entitled to insert a clause enabling the heirs to take advantage of the provisions of the Aberdeen and Montgomery Acts (d).

Same conditions and fetters as in existing Entail.

(a) *Macleod v. Macleod*, 1 July 1828, 6 S. 1043.

(b) *Macpherson v. Macpherson*, 24 May 1839, 1 D. 797. Since the case of *Graham v. Stewart*, *infra*, this

cannot be considered a reliable authority.

(c) *Mackintosh v. Mackintosh*, 14 Dec. 1855, 18 D. 249.

(d) *Gilmour v. Gilmour's Trs.*, 22 Nov. 1855, 18 D. 78.

Lord Lyndoch's case.

The case of *Graham v. Stewart* (a) raised a very interesting question as to the construction of an ambiguous direction. The testator was heir in possession under an entail which he believed to be effectual, but which was afterwards found to be defective in the fencing of the prohibition against alienation; and he directed his testamentary trustees to convey to those succeeding him in the estate certain fee-simple lands,—the conveyance to be “under all the conditions, provisions, and clauses, prohibitory, irritant and resolute, of the said entail, so far as the same might be applicable, and so as to form a valid and effectual entail according to the law of Scotland.” As it was impossible to settle the fee-simple lands to the same uses as those of the original entail, without violating the direction to form a valid and effectual entail according to the law of Scotland, the question came to be, which of the two directions should be preferred. The House of Lords were divided on the point. The majority, consisting of Lord Cranworth, C., and Lord Brougham, ruled that the trustees were bound to execute an effectual entail, although this might have the effect of splitting the property. Lord St Leonards, taking, as we think, a sounder view of the intention of the testator, held that there was a positive direction to settle the new estate to the same uses as the existing entail, and that the direction to make it valid and effectual, meant merely that everything should be done to give to it all the efficacy that a destination conceived in the terms of the original entail was capable of receiving. Lord St Leonards also pointed out, what appeared to have escaped the attention of his colleagues, that an entail defective in the prohibition to alienate, was, in a certain sense, a valid and effectual entail previous to the Entail Amendment Act, *i.e.*, it was valid as a destination and effectual *inter heredes*. Nor, as he observed, was it likely that the testator, even if he had known of the defect, would have wished the additional lands to be settled differently from the bulk of the property (b). It is not likely that the decision will be of much use as a precedent; but the opinions *pro* and *con* are deserving of careful study.

Entail proceeding on defective power validated by Prescription.

If a trustee appointed to carry out a purpose of entailing, executes a deed which, in consequence of error or mistake, is found

(a) *Graham v. Stewart*, 14 June 1855, 2 Macq. 295, affirming 15 D. 558.

(b) See 2 Macq. 295.

to be ineffectual as a strict entail, and possession has been had upon the defective title for forty years, the personal obligation to execute a strict entail will be worked off; and the estate may be acquired in fee-simple (a); but it was observed by Lord Jerviswoode, who decided the point, that the trust might have been enforced, had an action for that purpose been brought by any of the substitute heirs of entail within the currency of the prescriptive period (b).

The duties of trustees acting under a direction to convey specific estates are, in the general case, purely ministerial. There is room for the exercise of a larger discretion in the fulfilment of directions to *purchase* land for the purpose of having it settled on heirs of entail. In order to the ascertainment of the truster's intentions, it is important to consider the object he had in view in postponing the execution of the entail until after his death. Some uncertainty in relation to the essential requisites of the entail is usually the determining cause. Amongst such causes of uncertainty, it may suffice to notice the following: (1) Uncertainty as to the parties who ought to be called to the succession; (2) As to the possibility of making a purchase on favourable terms, or in a suitable situation; (3) The existence of entailer's debts, which, if not cleared off before his death, might render the estate liable to eviction (c).

An example of the difficulty first referred to is presented in the case of *Cowan v. Turnbull's Trs.* (d). The testator's only son was afflicted with insanity; and, accordingly, instead of the estate being conveyed directly to him, it was left to trustees to be entailed, along with such lands as they might purchase out of the truster's personal funds, upon the son and his heirs-male, in the event of his restoration to health; but, if otherwise, to be entailed on a different series of heirs. In this case, the Court had no difficulty in deciding that the entail was not to be executed until the death or convalescence of the lunatic. In the case of *M^cInnes v. M^cAllister* (e), the testator left a sum of money to trustees, to be laid out in the purchase of lands, to be entailed, and to be procured, if possible, in

Purchases of
Lands to be
entailed.

Testator's in-
tention may
be inferred
from circum-
stances.

(a) *E. of Eglinton v. E. of Eglinton*, 28 May 1861, 23 D. 1369.

(b) 23 D. 1371.

(c) On the last point, see *Agnew v. Stewart*, 31 July 1822, 1 S. Ap. Ca. 820;

Herries, Farquhar, & Co. v. Brown, 10 Mar. 1838, 16 S. 948.

(d) *Cowan v. Turnbull's Trs.*, 13

June 1845, 7 D. 872.

(e) *M^cInnes v. M^cAllister*, 29 June 1827, 5 S. 862.

Argyllshire. In the *Lynedoch* case, the new lands were to be procured contiguous to the entailed estate. The desire of obtaining conterminous property is not unfrequently the motive for the constitution of such trusts. In such cases the trustees should not be too fastidious in the choice of an eligible property (a).

Explicit Directions as to Purchase must be obeyed.

It is necessary, however, to add, that the trustor's directions as to the nature of the subject of purchase, as to contiguity to other estates, etc., must be substantially complied with (b). In one case, where the direction was to entail lands to be acquired as contiguous to the entailed estate of Hoddam as possible, the Court authorized the purchase of superiorities with part of the funds (c); and in another case, where trustees had expended the sum of upwards of L.60,000 in the purchase of an estate without a mansion-house, it was declared, in an action instituted for the purpose, that the trustees were entitled to expend a balance amounting to L.10,000 in the erection of a suitable residence (d). On the other hand, it was determined that the purchase of feu and teind duties, payable to the heirs of entail as proprietors of the existing estate, "was not a legal or warrantable application of the trust funds, but was made in violation of the direction in the trust deed," which was to invest in the purchase of lands in Orkney, or any other place the trustees should judge expedient; and although, in the opinion of the Court, the trustees had acted *bona fide* in making the purchase, they were held liable to account for the capital sum applied in the purchase (e). Where a statute authorized the sale of the superiorities and part of the lands of an entailed estate for payment of debts, and provided for the establishment of a sinking fund in order to the purchase of lands equivalent in annual value to the revenues of "such parts of the said entailed lands" as might be sold, it was held to be unnecessary to provide an equivalent for the superiorities (f).

(a) *Dickson's Tutors v. Scott*, 2 Nov. 1853, 16 D. 1.

(b) See *M'Innes v. M'Allister*, 29 June 1827, 5 S. 862; *Graham v. Stewart*, 14 June 1855, 2 Macq. 255.

(c) *Pet. Sharpe*, 11 Feb. 1823, 2 S. 203.

(d) *Sprot's Trs. v. Sprot*, 11 Mar. 1830, 8 S. 712.

(e) *Pollexfen v. Stewart*, 14 July 1841, 3 D. 1215. Moveable property, heirlooms, etc., are not proper subjects of an entail (*Baillie v. Grant*, 21 May 1859, 21 D. 138; *Cameron's Trs. v. Cameron*, 14 Dec. 1860, 23 D. 172). But see p. 100, *supra*.

(f) *Loval v. Fraser*, 11 Mar. 1842, 4 D. 1062.

Under the 26th and 27th sections of the Entail Amendment Act (a), the heir entitled to succeed to money held in trust to be entailed on the same series of heirs as are called to the succession by an existing entail, may, if he be not entitled to acquire the fund in fee-simple, apply to the Court for authority to lay out the money in extinction of entailer's or other debts, in redemption of land-tax, or in repayment of money expended in permanent improvements. To remedy doubts (b), the operation of this provision was, by 16 & 17 Vict. cap. 94, § 8, extended to trusts which had been partially implemented. In construing these sections it has been held, that if the trust excludes *one* of the heirs of the existing entail, although the effect of such exclusion is only to propel the succession for one life, the trust cannot be held to be for the benefit of "the same series of heirs," and therefore the funds are not applicable to the extinction of burdens (c).

Application of Trust Money under Entail Amendment Act.

It is the duty of trustees, when they have acquired land under the powers of a settlement, to execute an entail forthwith, although there may be surplus funds remaining in their hands uninvested; for the heir is not bound to wait the occurrence of an opportunity for making an investment which would exhaust the fund (d).

Trustees ought not to defer execution.

As to the form in which a power to execute an entail may be given, and the effect of words of implication, we refer to a subsequent chapter upon the Powers of Trustees (e).

SECTION II.

OF THE DISPOSAL OF RENTS AND UNAPPROPRIATED ACCUMULATIONS.

The points to be determined are, the term at which the investment may lawfully be made, and the disposal of the rents and produce of the estate arising either before or after that period. It is a general rule, that the fruits of the estate belong to the heir, or

Questions stated.

(a) 11 & 12 Vict. c. 36, § 26.

(b) See *Pet. Hamilton*, 13 July 1852, 14 D. 1003; *Pet. Maxwell*, 27 Feb. 1857, 19 D. 571.

(c) *Pet. Earl of Strathmore*, 3 Dec. 1858, 21 D. 68.

(d) *Campbell v. Campbell's Trs.*, 19 Nov. 1852, 15 D. 30, per Lord Cuninghame; *Gilmour v. Gilmour's Trs.*, 22 Nov. 1855, 18 D. 78.

(e) Chap. XXI. Section 3, *infra*.

to the party who would have been heir in possession, from the time at which an investment might lawfully have been made, although in point of fact no eligible investment has offered. Prior to that period the interest of the heirs of entail does not vest, and the fruits of the subject accordingly fall to be added to the capital.

Accumulations, either (1) not directed or directed, either (2) indefinitely, or (3) for a definite period.

From the decisions to which we are about to refer, it will be seen that three cases have been distinguished:—(1.) If accumulation is not expressly or impliedly directed, the interest vests in the institute or first taker *a morte testatoris*. (2.) If the direction merely involves accumulation until a suitable investment is found, the presumption holds, that the settlor intended to benefit all his heirs equally (*a*), and the trustees are therefore to invest within a reasonable time, which is in practice restricted to *one year* from the death of the testator. (3.) If the settlement directs accumulation for a specified time, or until a certain sum has been realized, or until the primary purposes of the trust have been fulfilled, the trustees must accumulate until the expiry of the term appointed, or until the arrival of the time at which accumulations are stopped by the operation of the Thellusson Act (*b*).

Heir entitled to accumulations, unless the contrary is directed.

1. The rule, that the heir is entitled to the whole unappropriated proceeds of an entailed succession, was first laid down by Lord Jeffrey, and adopted by the Court, in the case of *Howat's Trs.* (*c*). The testator directed his trustees to employ “all the residue of his personal estate and effects,” after satisfying legacies, etc., in the purchase of lands in the counties of Kirkcudbright or Dumfries, “so soon as they can meet with a purchase of an estate they think eligible;” and Lord Jeffrey, distinguishing the case from *Lord Stair's* case (*d*), ruled that where there was no direction to the trustees to invest interests and proceeds as well as principal, the trustees could not accumulate even during the first year; observing, that though they must have a reasonable time allowed, during which they should

(a) Per Lord Redesdale in *Stair v. Stair's Trs.*, 2 W. & S. 619. Some of the judges in the Court of Session gave an opinion that the *only* object of Scotch entailers was the perpetuation of *their own names and arms*—a supposition which cannot be proved; and which is at any rate inadmissible in the construction of trust settlements, being at variance with the maxim, that the

settlor is presumed to have contemplated the benefit of the grantee.

(b) Chapter VI. Sect. 3, *supra*.

(c) *Howat's Trs. v. Howat*, 17 Feb. 1838, 16 S. 622; *Campbell's Trs. v. Campbell*, 30 June 1838, 16 S. 1253, per Lord Jeffrey; *Campbell v. Campbell*, 11 Mar. 1830, 8 S. 713.

(d) *Stair v. Stair's Trs.*, *infra*.

not be liable in actual payment or performance, yet, on an ultimate settlement of accounts, the heir was entitled to the whole interest and profits actually drawn after the testator's death and not exhausted by any preferable application (a). In a later case, where trustees were by the terms of a trust settlement and codicil bound to invest in the purchase of land to be entailed, within three years after the testator's death, or as soon as the sum at their disposal should amount to L.30,000, and the residue at death amounted to that sum; the Court, reversing Lord Mackenzie's judgment, gave the interest of the first three years to the first taker (b).

The case of *Macpherson* (c) was attended with difficulty, from the circumstance that the direction to acquire and entail lands in Scotland was contained in an English will. The Court of Session were of opinion, that the right to the intermediate proceeds, prior to actual investment, fell to be determined according to the *lex loci contractus*, and obtained an opinion of English counsel, to the effect that accumulation was permissible for one year; and judgment was given accordingly. But, on appeal, Lord St Leonards held that the English case of *Sitwell v. Barnard* (d), on which the opinion was founded, applied only to cases like Lord Stair's in

Doctrine of English law raised in *Macpherson's* case.

Lord St Leonards' opinion.

(a) 16 S. 625-6.

(b) *Wilson v. Paul*, 11 July 1833, 11 S. 995.

(c) *Macpherson v. Macpherson*, 11 June 1852, 1 M'Q. 243, revg. 12 D. 486.

(d) *Sitwell v. Barnard*, 6 Ves. 520.

There seems to have been some little fluctuation of opinion on the point amongst the English judges. Lord Eldon, who decided *Sitwell v. Barnard*, evidently intended to establish a precedent for cutting down accumulations to one year, in cases where accumulation for a longer period was not enjoined. He never intended to sanction accumulation even of the first year's interest, as a rule of law, apart from the testator's will, as appears from the cases of *Angerstein v. Martin*, Turn. & Russ. 232, and *Hewitt v. Morris*, Turn. & Russ. 242, where his Lordship gave the life-renter the income as from testator's death. The case of *Stott v. Hollingworth*, 3 Madd. 161, where the

first year's income was given to the tenant for life, although there was no direction to accumulate, is not law, and was overruled in *Macpherson v. Macpherson* by Lord St Leonards, 1 M'Q. 250. The later cases are in perfect accordance with the opinion of the Court of last resort, as stated in the text. We would refer especially to *Dimes v. Scott*, 4 Russ. 195, decided by Lord Lyndhurst; to *Taylor v. Clark*, 1 Hare, 161, 11 L. J. Ch. 189; and *Douglas v. Congreve*, 1 Keen, 410, 6 L. J. Ch. 51, where there was no direction to accumulate, and Lord Langdale said, "It appears to me more likely to have been the intention of the testator, that, until the lapse of such convenient time as might be allowed to the executors to make the conversion directed by the will, the tenant for life should enjoy the interest of the residue as actually invested" (6 L. J. Ch. 55).

Scotland, where accumulation was expressly directed; and on a review of all the existing authorities, he decided, on principles equally applicable to both systems of jurisprudence, that there could be no accumulation *ex lege*. "The rule on which the Court proceeds," said his Lordship, "is, that this property was impressed by the will itself with the character of real estate, and that, being so impressed, it became real estate by construction of law;—and in my apprehension, it must be treated as if it were such at the moment of the testator's death."

Indefinite Accumulations.
Lord Stair's
case.

2. The import of the rule laid down by the Court of appeal in *Lord Stair's* case (*a*) has been so much canvassed (*b*), that it seems necessary, in referring to it, to state the exact points that were decided in the terms of the judgments. The direction was, "to lay out the residue of the trust funds, and interest and proceeds thereof, in purchasing lands, . . . to annex the same to my entailed estate by taking the rights and securities so to be purchased to the same heirs of tailzie," etc. The trustees having purchased lands to a considerable extent in the course of the first three years after the testator's death, an action was brought by the heir, concluding to have it found that he had right to the interest of the balance subsequent to the realization of the funds (*c*). The Court of Session assolizied the trustees from this claim, "reserving to the pursuer to be heard, in case any improper or unnecessary delay take place, whether he may not then be entitled to claim the interest of the residue of the funds not vested," etc. The House of Lords affirmed this judgment; but with a strong intimation of opinion that the grounds on which it had been rested could not be supported, and that a limit should be put to the period of accumulation (*d*). A second action was then brought, founded on the precedent of *Sitwell v. Bernard* (*e*), concluding that the heir was entitled to the interest from and after 1st June 1822, being twelve months after the death of the settlor. The Court again assolizied the trustees, in respect

(*a*) *Stair v. Stair's Trs.*, 29 Mar. 1825, 1 W. & S. 72, affg. 2 S. 205; Second Action, 24 May 1826, 2 W. & S. 414, revg. 4 S. 483; and 19 June 1827, 2 W. & S. 614, revg. 5 S. 476.

(*b*) See Lord Jeffrey's note, 16 S.

624; and Lord Curriehill's note in *Dickson's* case, 16 D. 3, with Lord Pr. M'Neill's remarks thereon, p. 5.

(*c*) 2 S. 205.

(*d*) 1 W. & S. 72.

(*e*) *Sitwell v. Bernard*, 6 Ves. jun.

520, 544.

there was no precedent for awarding intermediate profits to the heir, "and also in respect there has been no undue delay upon the part of the trustees in laying out the trust funds as appointed by the truster." The case was remitted, on the motion of Lord Gifford, who pointed out the expediency of laying down a general rule on the subject of accumulations (a). The Court, however, by a large majority adhered to the opinions formerly expressed by the judges; chiefly on the ground that the trustees had a discretionary power as to time, with which the Court could not interfere, except in a case of manifest delay. The case was afterwards argued before Lords Redesdale and Eldon, who embodied the judgment of the House in an opinion, by which it was declared that the appellant, Lord Stair, "was and is entitled, and that the several persons who shall from time to time succeed him in the entail of the said lands of Calquhasen and others, according to the course of such entail, will be from time to time entitled, to the interest and proceeds of the whole of the trust funds which have arisen from the end of the twelve months usually allowed, according to the course of the law of Scotland, for payment of debts and legacies, and which shall arise until the whole of the capital of the said trust funds, with the interest and proceeds thereof, which have accrued prior to the expiration of the said twelve months, shall have been applied in the purchase of lands, according to the directions contained in the said trust disposition" (b). Lord Eldon, who explained that, in deciding the cases of *Sitwell* and *Angerstein* (c), he went on presumed intention, and not upon any maxim peculiar to English jurisprudence, sums up his opinion in an affirmative answer to the following question:—"The question here is, it being the clear intent of this testator to give a beneficial interest to every one who was to succeed to his real property purchased in the counties in which he directed the purchase to be made,—whether the mere insertion of these words 'interest and proceeds,' may not be satisfied by a much more limited construction of them, than that construction which would make them mean interest and proceeds as they accrue and may be received until the money shall be so laid out" (d).

An indefinite purpose of Accumulation is satisfied by adding One Year's Interest to the Principal.

(a) 2 W. & S. 414.

(b) 2 W. & S. 615.

(c) *Sitwell v. Bernard*, *supra*; *Angerstein v. Martin*, Turn. & Russ. 232.

(d) 2 W. & S. 624.

Rule, that One Year a reasonable period for Accumulation, is it absolute?

In applying the rule of *Lord Stair's* case as to the disposal of intermediate proceeds to a settlement (a) which directed that, until such time as the trustees might find it convenient or proper to make the purchase therein expressed, the interest of a certain fund *should accumulate*, Lord President M'Neill (b) expressed his concurrence in the view that the restriction of accumulation to one year was not an absolute rule of law, but rather of practice, grounded upon the presumed intention of the testator that his heir should enjoy the benefit of the fund. The trustees had always a certain discretion as to the time of making the purchase; and while it would require a strong case to induce the interference of the Court to compel the literal fulfilment of the truster's directions, they might give relief in another way; on the principle that, although the trustees were giving way to fastidiousness in the selection of an estate, the heir was not to suffer loss from that mode of administration. Observing that accumulation for some period was clearly contemplated, his Lordship proceeded to inquire whether a year was a reasonable period:—He could easily conceive a case in which it would not be a reasonable period; but in ordinary circumstances it was so. There were two half-years' interest to be added to the principal sum, which was a sufficient accumulation to satisfy the words of the deed, where there was no evidence of any great desire to accumulate.

Period of Accumulation may be specifically fixed by the Settlement.

3. If, in a settlement expressly directing accumulation, the distribution is postponed to a certain period, the Court will not interfere with the accumulation enjoined by the settlor, however capricious or unreasonable the direction may be. In the *Strathmore* case (c), the avowed object of the settlor was to exclude his brother and two other parties from the succession; and for that purpose he conveyed all his unentailed estates, with all his personal property, to trustees, who were directed to *apply, lay out, and invest* the rents and profits of the estates and other property in the purchase of Government or heritable securities, until an opportunity offered of

(a) *Dickson's Tutors v. Scott*, 2 Nov. 1853, 16 D. 1; and see Lord Ivory's remarks in *Moncreiff v. Menzies*, 25 Nov. 1857, 20 D. 101: "The trustees could not have insisted on holding office indefinitely," etc.

(b) *Lord Colonsay*, 16 D. 5.

(c) *Earl of Strathmore v. Strathmore's Trs.*, 23 Mar. 1831, 5 W. & S. 170; *Keith v. Keith's Trs.*, *infra*.

applying the same to the purchase of lands contiguous to his other estates, to be entailed by the trustees; and he declared that the *trust should subsist* for thirty years after his death, and until the death of the longest liver of the three parties who were excluded from the succession. The trust was sustained as regards the appropriation of the rents of heritable estate which at the date of the grant (1815) were excepted from the operation of 39 & 40 Geo. III. cap. 98.

In *Keith v. Lord Keith's Trs.* (a), one of the purposes of the settlement which was in question, was to enable the trustees to hold estates specifically conveyed, as well as those which they were directed to purchase, until the death of the truster's daughter, or the birth of an heir. Meanwhile the trustees were directed to *levy and accumulate*, and lay out the same in the purchase of lands, to be entailed. The question was as to the application of rents levied after the passing of the Entail Amendment Act; the trust having by that time exceeded the limits prescribed by the 39 & 40 Geo. III. cap. 98, the provisions of which were by the Entail Amendment Act (b) made applicable to the proceeds of heritable property in Scotland. The Court ruled that the provisions of the Act were not retrospective (c).

Effect of
Thellusson
Act as extended
by 11 & 12
Vict. cap. 86.

Where the execution of a purpose of entailing is, by the terms of the settlement, postponed until the completion of certain primary purposes, such as payment of debts, legacies, or annuities, and the intermediate rents are directed to be added to the general fund, the purpose of accumulation is held to terminate on the completion of the primary purposes; and the heir entitled to succeed has then a vested *liferent* interest in the annual proceeds, so that, if he die before a purchase has been actually made, his interest in the profits accruing subsequent to the period of distribution will transmit to his representatives (d). And any interest or annual revenues directed by the Court to be paid over to the heir on the ground that the period of investment had arrived, vests in the heir as *personalty*, and is chargeable as such with *legacy-duty* (e).

Period of Ac-
cumulation
may be made
dependent on
the extinction
of Debt, etc.

- (a) *Keith v. Keith's Trs.*, 17 July 1857, 19 D. 1040; see 1044. 15 S. 1153; *Dickson v. Dickson*, 8 June 1855, 17 D. 814; *Ogilvie v. Boswell*, 27 Jan. 1852, 14 D. 363.
(b) 11 & 12 Vict. cap. 36, § 41.
(c) 19 D. 1057, *et seq.*
(d) *Stewart v. Traill*, 16 June 1837, July 1850, Exch. Rep.
(e) *Adv.-Gen. v. Stair's Tr.*, 15

Vested Rights
of the Bene-
ficiary before
Conveyance.

If the entail is to be executed in favour of the heir *who shall have attained majority* at the appointed period, it is held as executed as soon as a purchase has been made; and it is immaterial that the heir entitled to succeed at the actual date of the *purchase is a minor*, if there was an heir who had attained majority, at the earliest period when the purchase might have been made (a). Beneficiaries surviving the period of vesting have the same rights as heirs of entail, in the matter of burdening the fund with provisions to widows and children, etc. (b). And it has been decided, that where, during the lifetime of an heir, the period had arrived at which a purchase *might* have been made, but was not—the trustees having in such cases a discretionary power to accumulate for one year—the heir, dying during the year of accumulation, was entitled to grant a bond of annuity to his widow, under the Aberdeen and Entail Amendment Acts; for the application of the rents to the purpose of accumulation is not regarded as a burden extinguishing the free rental, seeing that the accumulations go to enhance the capital (c).

Where Purchase exhausts
the Capital,
how surplus
Revenues are
to be applied.

Where trustees invested with a discretionary power of accumulation had, after keeping up the trust for a lengthened period, ultimately made an investment which more than exhausted the original fund, they were found not to be entitled to retain the surplus accumulation as a nucleus for a second purchase; and the balance, amounting to L.2000, was directed to be paid over to the executors of the heir who would have succeeded had the purchase been made when the settlement came into operation (d).

Debts charged
upon Capital,
not to be paid
out of Re-
venues.

If by the terms of the settlement debts and expenses are made a burden on the fund for investment, the trustees cannot charge them upon the intermediate profits; but as such charges form a proper burden on the fund as at the testator's death, they may be deducted from the capital before estimating the amount of the profits available for investment (e).

(a) *Stewart v. Traill*, *supra*; *Stainton v. Stainton's Trs.*, 25 Jan. 1850, 12 D. 571.

(b) *Stainton v. Stainton's Trs.*, *Dickson v. Dickson*, *supra*.

(c) *Dickson v. Dickson*, *supra*. See 11 & 12 Vict. cap. 36, § 29.

(d) *Moncrieff v. Menzies*, 25 Nov. 1857, 20 D. 94.

(e) *Campbell v. Campbell*, 30 June 1838, 16 S. 1251; see 1257.

CHAPTER XIX.

OF PRIVATE TRUSTS FOR BEHOOF OF CREDITORS.

As trusts for behoof of creditors form a distinct branch of our subject, differing both as regards the form of the trust and the functions of the trustee from private settlements, we have for convenience brought into one chapter everything that seemed necessary to be stated upon the relation of the trustee to the general body of creditors upon a trust estate.

There is a material distinction between the case of a trust where the deed is stated to be for behoof of Creditors specified in a Schedule, and the case where it is stated to be for behoof of Creditors generally. In the former case, the object of the transaction is the creation of a security; and therefore, if the title of the trustee be completed beyond the period of Sixty days anterior to bankruptcy, the security is effectual to the creditors for whose benefit it was created. In the latter case, the principle of the trust is that of equal distribution, and the execution of the trust is equivalent to a declaration of insolvency. It will be seen that such trusts may be defeated at any time by non-acceding creditors.

Distinction between Trusts for Creditors scheduled, and Trusts for Creditors generally.

As the duties of the trustee are very similar in both classes of trusts, we have not thought it necessary to make a formal division of the subject on this basis; but the distinction must be kept in view in all questions concerning the validity of the trust, and the rights of acceding creditors (a).

The subject of this chapter may be divided as follows: *First*, Of the constitution of trust deeds for creditors, and of accession; *secondly*, Of the duties of trustees in the fulfilment of trusts for creditors; *thirdly*, Of settlements by way of composition.

(a) See Bell's Principles, § 1138.

SECTION I.

OF THE CONSTITUTION OF TRUST DEEDS FOR CREDITORS,
AND OF ACCESSION.I. *Of the Validity of Voluntary Trusts.*

Settlement
may be con-
verted into
Trust for Cre-
ditors.

A trust for behoof of creditors may be created either by a testamentary conveyance, or by a deed *inter vivos*. Testamentary settlements for behoof of the grantor's creditors as the principal beneficiaries of the trust are not of common occurrence (*a*); but if the trustee of a family settlement is aware that the estate is likely to prove insolvent, he ought to consider himself a trustee for the interest of the truster's creditors, and to preserve the surplus fund for rateable distribution (*b*). However, unless the insolvency is patent, the trustee may pay *primo venienti* after the elapse of six months, subject to preferences (*c*). If the creditors agree to convert the trust as it stands into a private trust for their own behoof, he will, from the execution of an agreement to that effect, be subject to the guidance and directions of the creditors. If a voluntary arrangement cannot be effected, the safest course is to have the funds distributed under the sanction of the Court in an action of multiple-poining or judicial sale. We may remark, however, that where any doubt exists as to the solvency of the estate of a defunct, the better course is to decline the trust altogether, and allow the estate to be wound up by a judicial factor, or to be sequestrated under the Bankruptcy Act in the usual manner (*d*).

Trust may be
defeated by
Creditor apply-
ing for Seque-
stration.

The object of a private trust settlement for creditors is usually twofold:—*First*, To accomplish a speedy and inexpensive distribution of the bankrupt's entire estate amongst his creditors in the order of their completed preferences; and *secondly*, To secure to the grantor the benefits of a discharge of his debts, and protection from diligence, without exposing himself to the annoyance and injury re-

(*a*) See *Cooper v. Mackenzie*, 13 Jan. 1860, 22 D. 380; *Watson v. Johnston*, 10 Apr. 1848, 6 Bell, 245.

(*b*) *Gardner v. Pearson*, 28 Nov. 1810, F. C.; *Young v. Johnston's Trs.*, 15 June 1841, 3 D. 1020.

(*c*) *Globe Ins. Co. v. Mackenzie*, 5 Aug. 1850, 7 Bell, 296; affg. 11 D. 618, and cases there cited; see Act of Sed. 1662.

(*d*) See 19 & 20 Vict. cap. 79, and Act of S. 25 Nov. 1857.

sulting from a sequestration. As voluntary trusts do not stop the acquisition or completion of such rights by non-acceding creditors, it will be necessary, where steps have been already taken towards the acquisition of preferences, to obtain the consent of the pursuing creditors to a discharge of their preferences. If their consent is refused, the trustee must adopt the requisite legal measures for cutting down such preferences, which he is entitled to effect on the footing that the disposition *omnium bonorum* in his favour is proof of the grantor's insolvency. However, unless the great majority of the grantor's creditors are likely to give in their accession to the trust, it would be useless to proceed with it; since it is in the power of any creditor, qualified under the Act, immediately on the execution of ultimate diligence to apply for sequestration of the estate, after which the advantages of a composition settlement cannot be obtained without undergoing an examination, unless a majority in number and nine-tenths in value of the creditors agree to the offer (a).

The common law of Scotland is not unfavourable to the extrajudicial winding up of the estates of insolvents. Not long after the Act 1696, cap. 5, it came to be admitted that a debtor was entitled to make provision, by his own act, for the settlement of his affairs, provided the settlement was unqualified by reservations in his own favour, and the rights of the creditors *inter se* left to be regulated by the law of bankruptcy (b). But as the principles of the law of bankruptcy came to be better settled, the doctrine was recognised, that such deeds derived their efficacy from the assent of creditors alone; though down to the period of the introduction of sequestration by the Act 54 George III. cap. 137, there was much fluctuation of opinion on the point (c), the result of which is stated by Lord Kilkerran, in his report of *Snodgrass v. Beats' Crs.*, who says:—"The Lords have come and gone upon the question how far, when one is bankrupt in terms of the statute, he can, by a general disposition to his creditors, tie them up from after diligence: and

Trusts reducible when executed within 60 days of Bankruptcy.

(a) 19 & 20 Vict. cap. 79, § 137.

(b) *Sutherland v. Watson's Crs.*, 1724, M. 1199; *Watson's Crs. v. Muirhead*, 17 Nov. 1825, M. 1201; *Eyemouth's Crs.*, 1726, M. 1203, overruling *Drysdale's Crs.*, 1696, M. 1197.

(c) *Smee & Co. v. Anderson's Crs.*,

1734, M. 1206; *Earl of Aberdeen v. Lewis*, 1736, M. 1208; *Jackson v. Simpson*, 1757, M. 1212; *Leith v. Livingston*, 1759, M. 1212; *Wilson v. M^r Vicar*, 1762, M. 1214; *Jamieson v. Coult's & Co.*, 1763, M. 1216; *Mudie v. Dickson*, 1764, M. 1104.

by the latest decisions, it is found that he cannot" (a). Ultimately, the House of Lords decided against the validity of trust deeds in competition with non-acceding creditors (b). Since that time it has been repeatedly held that trust deeds granted within sixty days of bankruptcy are ineffectual in competition with legal diligence (c); though, where the challenge has been deferred until after the trustees have already entered upon a course of beneficial administration, the Court will not allow their management to be interfered with until matters have been put in train for judicial settlement (d).

Reduction of
Trust Deeds
under Statute
1621, c. 18.

Irrespective of the operation of the modern Bankruptcy Acts, trust deeds were liable to be cut down after the lapse of sixty days from their date, as being in defraud of the diligence of non-acceding creditors, and in virtue of the Act 1621, cap. 18. The right of challenge under the second branch of this statute is founded on the creditor's interest to have his diligence completed without suffering any interruption from the voluntary act of the debtor. The statute was held to apply equally to trust deeds as to individual preferences, for the obvious reason that the creditor's interest to follow out his diligence was not less materially abridged by the operation of a trust than by that of a deed of security; for such arrangements, however beneficial to the common interest, could not be allowed to operate to the injury of the individual creditor who had availed himself of the means provided by law for attaching the property of his debtor (e).

Trust may be
defeated by
the Execution
of Ultimate
Diligence;

In virtue of the existing Bankruptcy Act (f), which in this respect is based upon previous legislative provisions (g), insolvency (of which the execution of a trust deed *omnium bonorum* is legal evidence), coupled with the execution of ultimate diligence, etc., is notour bankruptcy, and entitles the creditors, or the bankrupt, with concurrence of a creditor or creditors possessing the requisite quali-

(a) *Snodgrass v. Beats' Crs.*, 1744, M. 1209.

(b) *Peters v. Spiers*, 18 Dec. 1767, M. 1218; *Johnson v. Fairholme's Crs.*, 1770, M. App. Bankt., No. 5.

(c) *Hutchinson v. Gibson*, 1791, M. 1221; *White v. Watson*, 1803, Hume, 649; *Munro v. Fraser*, 5 Br. Sup. 385.

(d) *Kerr v. Graham's Trs.*, 17 Nov. 1827, 6 S. 78, 270.

(e) *Farquharson v. Cumming's Crs.*, 1729, M. 1205; and see *Mansfield v. Brown*, 1735, M. 1207; *Wardrop v. Fairholme*, 1744, M. 4860.

(f) 19 & 20 Vict. cap. 79, § 7-15.

(g) 54 Geo. III. cap. 137; 2 & 3 Vict. cap. 41; 16 & 17 Vict. cap. 53—now repealed.

fication, to apply for sequestration of the estate; and accordingly, even where the estate has been effectually vested in trustees by infestment and tradition of moveables, it may be taken out of his person at any time within four months of insolvency by the operation of the vesting clause of the Bankruptcy Act (a).

It may easily happen, from the circumstance of there being no diligence begun prior to the trust, or otherwise, that the reductive provisions of the Acts 1621 and 1696 are inapplicable. The operation of the Bankruptcy Act, again, may be excluded, in the event of no qualified creditor coming forward to apply for sequestration. Even in the case supposed, however, the trust is still liable to be defeated at the instance of non-acceding creditors resorting to the process of judicial sale, to which the subsistence of a voluntary trust is no bar (b). Trusts which are not so framed as to confer a preference on individual creditors, may be defeated indirectly at any time by non-acceding creditors. The principle of the trust is equal distribution; and any creditor, by resorting to any diligence under which he may obtain payment, will render the trust ineffectual by defeating its purposes (c). Subsequent creditors, however, cannot interfere; they can only attach the reversionary interest (d).

or by Action
of Judicial Sale;

or by Creditors
pursuing
separate mea-
sures.

II. *Of the Constitution of Trusts for Creditors.*

A trust conveyance for behoof of creditors may be constituted by the act of the insolvent himself, either without or with the assent of his creditors. In the former case, the granter must execute the settlement unconditionally, and take the risk of a reduction: in the latter, he will naturally stipulate for the usual terms of personal protection and ultimate discharge, which, in strict form, ought to be embodied in a relative deed of accession to be executed by the creditors; for, it is said, if the conditions in the bankrupt's favour are

Trust Convey-
ance must be
unconditional,
unless Cre-
ditors are
parties.

(a) 19 & 20 Vict. cap. 79, § 102. The same result had been arrived at by judicial construction of former statutes: *Earl of Kellie v. Crawford*, 28 Feb. 1821, F. C.; 13 Nov. 1821, 1 S. 126; *Lockie v. Mason*, 14 Feb. 1837, 15 S. 547.

(b) *Cruttenden v. Rattray*, 2 Dec. 1824, 3 S. 247.

(c) *Earl of Breadalbane v. M'Donald*, 16 Jan. 1824, 2 S. 529; *Colville's Crs. v. Colville's Trustee*, 1779, M. 1221; *Leith v. Livingstone*, 1759, M. 1212.

(d) *Campbell v. Ederline's Crs.*, 14 Jan. 1801; M. App. Adj. No. 11; *Herries, Farquhar, & Co. v. Burnett*, 20 Nov. 1846, 9 D. 111.

Stipulation for discharge. made to flow from his own act, the proceedings are liable to be swept away at the instance of any recusant creditor who may choose to draw back from the arrangement (a). In practice, however, it is usual to stipulate in the trust deed, that creditors taking benefit under it discharge the debtor. This in the case of simple trusts is held to obviate the necessity for a separate deed of accession. As a check upon the prosecution of separate measures, a power is also given to the trustee, in the event of any of the creditors declining to accede, to apply for sequestration of the estate under the Bankruptcy Act (b).

Ex facie Absolute Disposition.

As regards the form of the deed of trust, it is essential that it should contain *in gremio* a perfect legal transference of the insolvent's whole estate to a trustee, upon which the latter may complete a title according to the rules of conveyancing. It is not unusual to insert a destination to heirs and assignees; a better form of destination is to take the conveyance to two or more trustees in succession (c). As we remarked, in treating of trusts for sale (d), a convenient form of trust conveyance is that of an absolute disposition, accompanied by a back-bond of trust in favour of creditors for their respective interests, expressing the purposes of the conveyance, and containing a clause of registration for execution against the trustee. The chief advantage of this form is, that it enables the trustee to give an unimpeachable title to purchasers, absolving them from any concern with the purposes of the trust or with the application of the purchase-money. But the same objects may be accomplished by a regular trust deed with ample powers, which is less expensive, and, unless in very large trusts, is the form generally used in practice.

Disposition in Trust the preferable form.

Purposes of the Trust.

If the form of an ordinary trust disposition is adopted, it will contain the purposes usual in settlements for creditors, which are—the sale of the debtor's whole estate, the payment of his just and lawful debts, and the retrocession of the debtor and his heirs. In the case of trusts for the benefit of individual creditors, there is an advantage in specifying the debts so far as known, which may be

(a) *Grant v. Cunningham*, 1747, M. 1210; *Sutherland v. Watson*, 1724, M. 1199. See Bell's Com. 1173.

(b) See form in Appendix.

(c) *Supra*, p. 267 (Appointment of New Trustees).

(d) *Supra*, p. 355.

done by reference to a schedule (a); the trustor being bound, of course, by his admission of liability to the extent of the debts thus set forth (b). A disposition to the creditors directly as joint *pro indiviso* donees is open to the objection, that it does not provide for the administration of the property, or for bringing in other creditors who may afterwards appear. It is, however, usual and proper to name a committee of creditors to advise with the trustee.

Powers of Creditors or Committees.

It is, of course, proper to secure the acceptance of the trustee before the completion of the settlement; though it would seem, on the analogy of family settlements, that his non-acceptance does not destroy the radical interest of the creditors as beneficiaries, or deprive them of the preference which the execution of a settlement in their favour gives over creditors claiming on debts posterior to the date of execution (c). In the event of the death of the trustee, the estate may be taken up by his heir serving as heir of provision *pro forma* for the purpose of conveying the estate to the creditors or to a new trustee for their behoof (d). If there be no destination to the heirs of the trustee in the settlement, the process of declaratory adjudication will be available for the purpose of reinstating the trustor and his creditors for their respective interests. The deed of settlement should contain a power in favour of the creditors of electing a new trustee or trustees if necessary (e). If the vacancy arises by a resignation, the estate may be transferred to the new trustee by deed of devolution by his predecessor. If it is caused by death, the title may be made up by declaratory adjudication.

Trust subsists notwithstanding failure of the Trustee.

Mode of providing against a lapse.

Although the trustee's title of administration is liable to be defeated by judicial proceedings at the instance of non-acceding creditors, it will be understood that any real rights which he may

Preferences acquired by Trustee subsist, although the Admini-

(a) See form in Appendix.

(b) *Wotherspoon v. Winning*, 18 Jan. 1849, 11 D. 371; *Ettles v. Robertson*, 15 Feb. 1883, 11 S. 397. See 7 W. & S. 176. The enumeration of debts does not change their nature from moveable to heritable. *Hawkins v. Hawkins*, 23 May 1843, 5 D. 1035, overruling Ersk. 2, 2, 15.

(c) See the cases of *Dallas v. Leishman*, 1710, M. 16191; *Campbell v.*

Monzie, 1752, M. 14703; and cases on Acceptance, *supra*, Chap. XIII.

(d) The creditor's right of action transmits against the trustee's heir; *D. of Hamilton's Cr. v. E. of Selkirk*, 1740, Elch. Tr., No. 9.

(e) See *Earl of Lauderdale v. Earl of Fife*, 9 Mar. 1830, 8 S. 675. *Quære*, Can the Court grant authority, if necessary, for the election of a new trustee? See *Pet. Mitchell*, 28 Jan. 1860, 22 D. 632.

stration
stopped by
non-acceding
Creditors.

acquire for the benefit of his constituents will enure to them, notwithstanding the supercession of the trust, and will, if completed before the acquisition of a real right on the part of non-acceders, confer a preference on the creditors for whom the trustee acts. On this account, it is of the utmost importance to the interests of the trust that the trustee should lose no time in completing his title to the property and effects of the bankrupt which are the subject of the disposition in his favour. For it will be observed, that the result of the competition between the trustee, as holding for the general body of creditors, and the non-acceding creditors pursuing separate measures, depends upon priority in the completion of the title; that is, upon priority of infeftment in the case of heritage, and of delivery or intimation in the case of personal property.

Completion
of Trustee's
Title.

The following suggestions as to the means to be pursued by voluntary trustees in order to secure a preference in bankruptcy, are adapted, with some additions and modifications, from Mr Bell's chapter on Trust Deeds for Creditors (a).

Where Trustee
is infeft.

When the truster is feudally infeft, there can be no difficulty in the ordinary case. The trustee, by the debtor's conveyance, acquires right to the estate, and his title is completed by recording the disposition in the Register of Sasines. The only case which calls for special notice, is that in which the creditors stand opposed to a purchaser possessing on a minute or missive of sale or a disposition in the old form, without precept or procuratory. As the purchaser is in law only a creditor for the value of the property, it will be the duty of the trustee acting for the other creditors to endeavour to gain a complete title, which may disappoint the hopes of the purchaser, and bring him in only as a creditor among the rest. The conveyance in favour of the trustee gives him the same right as the purchaser, and the party who gets the first adjudication in implement will have a preferable right to the estate.

Where Trustee
not infeft,
Trustee takes
tantum et tale.

Where the truster is not infeft, two cases may be distinguished: one, where he holds by singular titles; the other, where he has succeeded to the estate. If, in the former case, the truster possessed on an unrecorded conveyance, the trustee, by virtue of the general assignation in his favour, may complete his title by recording both

(a) Bell's Com. (6th Ed.) 1174.

instruments. In this case the trustee, not being an onerous assignee, can only take the debtor's interest *tantum et tale* (a). It sometimes happens that the debtor has burdened his estate, and that the conveyance to the purchaser or creditor has been put upon record as a *de me* conveyance, while the debtor himself was not infeft. If the creditors allow the debtor's title to be completed by registration, the infeftment will accresce to the right already granted, which will thereupon become a complete and preferable right (b). The trustee must therefore pass over the debtor, and take infeftment on an assignation to the debtor's title; by which means the infeftment already taken on the other conveyance will become ineffectual.

If the debtor has succeeded to his ancestor, and his titles be not yet completed, the trustee must proceed to complete the title, either by service of the debtor as heir to his ancestor, or by notarial instrument in his own favour upon the ancestor's general disposition, as the state of the title may require.

Where Trustee possesses on apperancy.

If the debtor's title-deeds have been deposited, subject to a lien, the trustee cannot enforce delivery, except under reservation of the preference thereby created; but if they have been delivered to him under reservation of preferences, and the trustee, on considering the matter, should decline to take up the property, he is not deemed to have made such use of the documents as would oblige him to recognise the lien (c).

How far Agent's Lien gives a preference.

III. *Of Accession by Creditors.*

Accession may either be declared by deed or implied from circumstances. In the former case, the acceding creditor is bound by his subscription, or by that of a mandatory authorized to act for him, to certain conditions in favour of the insolvent (d); amongst which the most usual are, a consent to a *supersedere* of diligence, or a delegation of the creditor's power over the debtor to the trustee, and an agreement that if, after a certain time, dividends shall have been paid to a specified amount, the debtor shall be entitled to a discharge as to his personal liberty and future acquisitions, or that

Accession by Deed or Writing.

(a) Compare *Redfearn v. Somervail*, 5 Pat. 707, with *Dingwall v. McCombie*, 1 S. 463, 2 S. (N. E.) 567. (c) *Rennie & Webster v. Myles*, 8 Feb. 1847, 9 D. 626.
(b) *Stair*, 3, 2, 1; *Ersk.* 2, 7, 3. (d) *Gibson v. Macdonald*, 7 Dec. 1824, 3 S. 263.

he should be discharged of all his debts by the assent of a certain proportion of the creditors. By the deed of accession the trustee is also clothed with the necessary powers of management, which will embrace such of the functions of the trustee in a sequestration as may be thought appropriate; and the creditors bind themselves to observe all the rules of a sequestration. The deed may also reserve powers of assumption, and authority to compel the resignation of the trustee in the event of his delaying the execution of the trust unreasonably.

Accession inferred from circumstances.

Accession may also be inferred from facts and circumstances inconsistent with the supposition of an intention on the part of the creditor to resort to separate measures for the acquisition of a preference. The subscribing of agreements or minutes of meeting of the creditors would, on the ordinary principle of *rei interventus*, be sufficient to bar a creditor from resiling. The law of accession, however, is in this respect unusually favourable to the general interest of the creditors, inasmuch that the mere attendance of a creditor at a meeting at which common measures are resolved upon without expressing dissent, acknowledgment of the trustee by purchasing from him (a), or such other acts indicative of acquiescence as are likely to deceive the other creditors into the belief that they are taking him along with him, may be stated as a relevant objection to any separate proceeding on the part of the creditor (b). But a mere tacit recognition of the trustee, as by allowing decree to pass in absence, in a suit at the instance of the trustee for a debt due to the constituent, amounts to nothing more than a *non repugnantia*, and does not imply accession (c).

Accession *rebus et factis* does not import assent to Conditions of the Trust.

But although circumstances indicating an approval of the proceedings may be received in evidence of accession to the extent of recognising the trustee's title to administer, a consent to conditions in favour of the insolvent will not be so easily implied. Thus, in *Heriot v. Farquharson* it was observed, that the Court is at liberty

(a) Compare *Globe Ins. Co.*, 16 D. 1080, with opinions in same case, 7 Bell, 296, and 11 D. 618; *Lea v. Landale*, 15 Jan. 1828, 6 S. 350; *Lyell v. Christie*, 11 Mar. 1823, 2 S. 253; *Larkins v. Smith*, 1 July 1824, 3 S. 140; *Croll's Trs. v. Robertson*, 1791,

M. 12404; *Campbell v. Simpson*, 1791, M. 11683.

(b) *Anderson v. Starkie & Co.*, 2 Mar. 1813, F. C.; *Herriot v. Farquharson*, *infra*.

(c) *Mackie v. Mackinnel*, 6 June 1822, 1 S. 465.

to consider the nature and effect of the contract to which the creditor is said to have acceded, and that the circumstances from which the accession is attempted to be inferred will naturally be taken with more scruple if the contract is attended with hardship, than in the case where its sole effect is to introduce equality among the creditors, and to prevent unjust preferences; and accordingly the Court found in that case that there was sufficient evidence of the pursuer's accession to the trust disposition, but "found no evidence that he acceded to the deed of accession relative to the said trust deed, or that he is bound thereby" (a). Obligations to accept of a composition, to compromise claims, or to submit questions of ranking and preference to arbitration, will not, as a rule, be held binding upon a creditor constructively acceding, but must be proved against him by evidence of special agreement to such conditions (b). Yet, even as regards conditions in the insolvent's favour, the principle of *rei interventus* may have place in the absence of more formal evidence of assent. And accordingly, if the friends of the bankrupt, for the sake of procuring the accession of other creditors to an amicable arrangement, agree to relinquish securities, or to suspend the execution of diligence, creditors who listen to such proposals, and take the benefit of the proffered concession, will not be allowed to plead that they have not made themselves parties to the deed (c).

The question has been raised by Prof. Bell (d), whether the contract implied in accession has relation to the person of the creditor or to his claim; in other words, whether, on the one hand, the assignee of an acceding creditor is bound by the accession of his cedent, and on the other, whether an acceding creditor can disclaim his accession to the trust in reference to any debt which he may

How far accession binding on the Creditor personally and on Assignees.

(a) *Heriot v. Farquharson*, 27 June 1766, F. C.; M. 12404.

(b) *Thomson v. Dudgeon*, 20 Feb. 1855, 17 D. 455; *Heriot v. Farquharson*, *supra*; *Blyth v. Chisholm*, 2 Mar. 1833, 11 S. 512.

(c) See also on this subject the following cases: *Campbell v. M'Donald's Trs.*, 3 July 1829, 7 S. 826; *Mills v. Hamilton*, 1 Dec. 1830, 9 S. 110; *Bell v. Morton*, 31 May 1831, 9 S. 651; *Kerr's Trs. v. Russell*, 15 Dec. 1832,

11 S. 219; *Hamilton v. D. of Queensberry's Exrs.*, 21 June 1834, 12 S. 766; *Jopp v. Sir A. L. Hay*, 22 Dec. 1844, 7 D. 260, where accession was not inferred; but see *contra*, *Brisbane's Trs. v. Crawford*, 3 Feb. 1826, 4 S. 427; *Borthwick v. Shepherd*, 13 Nov. 1832, 11 S. 1; *Littlejohn v. Hamilton*, 2 S. & M.L. 355, revg. 11 S. 701, where accession was inferred.

(d) Bell's Com. (6th Ed.) 1180.

subsequently acquire? Prof. Bell answers both questions in the affirmative, holding that accession binds the person of the creditor as regards future purchases, and also that assignees are bound by such personal exceptions as are pleadable against the cedent (a). But he is of opinion that a general accession would not prevent a creditor from resorting to diligence for securing a right of succession, or other unforeseen acquisition.

Accession conditional on consent of other Creditors being obtained.

The accession of creditors to a voluntary trust is qualified by the implied condition that other creditors shall also accede. If, therefore, any of the creditors stand aloof and refuse to join in common measures against the debtor, an acceding creditor is entitled, for his own protection, to proceed with separate diligence notwithstanding his accession (b). If an acceding creditor have already received his dividend and discharged the insolvent, he has no title to interfere with the pursuance of separate diligence by others (c).

Unfair preferences, etc., entitle Creditor to resale.

The principle of equal distribution is a necessary condition of all voluntary arrangements between creditors and their debtor; and, therefore, any advantage promised or given to individual creditors for the purpose of procuring their assent, will be a sufficient ground for setting aside the arrangement, at the suit of the trustee or any other of the creditors, whose lawful interests in the estate are necessarily diminished in the same degree as that of the favoured creditor is increased (d). The case of *Anderson v. M'Nair & Brand* is an example (e). The defenders, who were in the habit of making advances on the shipments of a firm trading between Glasgow and Singapore, became parties to an arrangement under which the estate of the latter was to be wound up by a liquidator and a committee of creditors, by whom all remittances, whether for general or special account, were to be received. Subsequent to the date of this arrangement, a shipment having arrived at Glasgow, the defenders, in pursuance of their ordinary course of dealing, granted an acceptance to account of the value of the cargo, receiving the

(a) *Dick v. Murison*, 13 Nov. 1845, 8 D. 1.

(b) *Jopp v. Hay*, 22 Dec. 1844, 7 D. 260; *Watson v. Fede*, 1724, M. 6897.

(c) *Blyth v. Chisholm*, 2 Mar. 1833, 11 S. 512.

(d) *Mack v. Jenkins*, 25 Nov. 1814, F. C.; *Arrol v. Wight*, 29 May 1810, rep. in Bell's Com. 1188. See the English cases in Smith's Mer. Law, 727.

(e) *Anderson v. M'Nair & Brand*, 14 Jan. 1859, 21 D. 257.

bills of lading in security. The defenders refused to give up the bills of lading on being relieved of their acceptance, and insisted on their right to retain in security of previous advances; and the trustee thereupon applied for an interdict against the negotiation of the bills of lading, on the ground that their retention by the defenders was an illegal preference, and contrary to the good faith of the agreement. The Court granted interdict as craved.

Although a trustee has been expressly authorized by the general body of creditors to give an advantage to creditors of a particular class for the sake of purchasing their adhesion—as, for example, by giving heritable creditors a *joint* preference over all the lands to which their several securities extend—such authority will be no answer to a personal action at the instance of non-acceding creditors claiming their equitable share of the insolvent's estate (*a*). In practice it is not unusual to authorize the trustees to pay creditors in full, below a certain amount.

Consent of acceding, no bar to reduction by non-acceding Creditors.

The trust may be invalidated by the operation of a clause in the trust deed or relative deed of accession, declaring that it shall be void in the event of the creditors not acceding within a certain time. But it appears that the Court of Chancery, upon grounds which would probably be recognized in our Courts, will support a voluntary trust, if, prior to the institution of a suit, the creditors have in point of fact assented to it or acquiesced in it, although the condition as to time has not been literally complied with (*b*).

Clause determining Trust in default of Accession.

If a debtor assign his property in whole or in part in trust for certain of his creditors, if the transaction be fair and *bona fide*, it will be sustained; for he is entitled to create a security in the form of a trust. But such conveyances are reducible under the second branch of the Act 1621, cap. 18, if granted after the contraction of debt, and after diligence has been begun (*c*). Such trusts will, of course, be liable to reduction under the Act 1696, cap. 5, if granted within sixty days of notour bankruptcy.

Trusts of part of Granter's Property.

(*a*) *Manfield v. Young's Tr.*, 30 Nov. 1843, 6 D. 146. The rule is different in a sequestration, where the resolution of the majority binds; see *Gray v. Fraser*, 6 Feb. 1850, 12 D. 684.

(*b*) *Spottiswoode v. Stockdale*, G. Coop. 102.

(*c*) See Bell's Prin. 1188, and cases *infra*, 416 (*g*).

SECTION II.

OF THE DUTIES OF TRUSTEES FOR CREDITORS.

I. *Of the Duty of Administration.*

Completion of
Title and
prevention of
Preferences.

Among the first duties which devolve upon a trustee appointed to administer an estate for behoof of creditors, are the completion of a title in his person, the securing of the assent of other creditors as far as practicable, and the institution of proceedings for cutting down or vacating illegal preferences and the diligence of creditors pursuing separate measures. Of these we have already spoken. The trustee must satisfy himself, at his own risk, as to the validity and extent of his constituent's title to the estate; taking care, for example, if his interest is limited to a liferent, not to pay dividends or incur obligations beyond the value of the current income. Sometimes a trust contemplates the raising of a fund by policies of life assurance, the premiums being payable out of the revenues of the estate. In this case the trustee may safely undertake the duty of receiving and distributing the fund, and of keeping up the policies in so far as the rents are sufficient for the purpose. But he will be liable to the fiar or next heir for any intromissions with the rents after his constituent's decease; the plea of *bona fide* possession being inapplicable to the case (a).

Realization
and Manage-
ment.

The next duties incumbent upon the trustee are those of realizing the moveable property and bringing the heritage to sale by public auction. By his title as legal proprietor of the estate, he is clothed with all usual and necessary powers of administration, so that he may pursue and defend actions on behalf of the insolvent without the consent of the latter (b), and may accept or renounce leases or heritable succession in which the insolvent had an interest (c). To avoid repetition, we refer, on the subject of realization and management, to the previous chapter, in which the general duties of trustees of heritable and moveable property are discussed (d).

(a) *Justice v. Ross*, 21 Nov. 1829,
8 S. 108.

(b) *Carrick v. Hutchison*, 11 June
1844, 6 D 1148.

(c) *Williamson v. Johnstone*, 23 Dec.
1848, 11 D. 332.

(d) See Chapter XVI. Section I.

With regard to prohibitory diligence, the duties of the trustee will be regulated by the provisions of the bankruptcy statutes of 1856, relating to arrestments and sales of heritable property. By the 12th section of the General Bankruptcy Act (*a*), all arrestments and poindings used within sixty days before or four months after notour bankruptcy, are to be ranked *pari passu*, among which are included arrestments on the dependence, provided the proceedings are completed without undue delay. Creditors producing a liquid ground of debt in a forthcoming or other action relative to the subject of arrestment or poinding, may be ranked as if they had executed diligence; and creditors who have already obtained payment may be compelled to refund. Arrestment used subsequently to the expiry of the period of four months, gives security only over the reversion. Inhibition may be discharged by bringing the property to a judicial sale, or by means of an adjudication in the name of the trustee for behoof of the creditors, or by a joint adjudication in name of the creditors themselves (*b*). The accession of an inhibiting creditor is not a sufficient authority to the trustee to proceed with a private sale unless the preference be expressly discharged (*c*). By the Act 19 & 20 Vict. cap. 91, purchasers at judicial sales are empowered to consign the purchase-money in bank for behoof of all having interest. Arresters of the equitable interest in a testamentary trust are not bound by the rules of diligence applicable to trusts for behoof of creditors (*d*).

Cutting down
uncompleted
Preferences
and begun
Diligence.

Where a trustee is empowered to decide as an arbiter upon the validity of claims, or to determine questions of preference, he must be guided by the rules of bankruptcy. But though the Court will endeavour as far as possible to withdraw the rights of the creditors from the caprice of the trustee, it cannot review his judgments on the merits, if he has been lawfully invested with the powers of an arbiter. It will be the duty of the trustee, in any event, to act upon strictly legal considerations, taking advice when necessary.

Trustee may
be empowered
to decide ques-
tions of Bank-
ing.

The trustee is bound by the law of the contract to lodge all monies received on account of the trust in bank in a separate

Liability for
Loss and
Breach of
Trust

(a) 19 & 20 Vict. c. 79, § 12.

(b) See 19 & 20 Vict. c. 91, as to Sales and Adjudications in Bankruptcy.

(c) *Munro v. Gordon's Crs.*, 1777, M. App. Inhib., No. 1.

(d) *Globe Ins. Co. v. Mackenzie*, 5 Aug. 1850, 7 Bell, 296; affg. 11 D. 618. See 16 D. 1080; Act of Sed. 1662.

account (a). If the funds appropriated to the payment of a current dividend are retained by the trustee in his own hands, and he fails, it would seem that the loss falls exclusively upon those creditors who have not already received payment, and that they will not be entitled to an equalizing dividend out of funds afterwards recovered (b). The trustee himself will be responsible for dividends which he may have omitted to pay to a creditor whose claim has not been formally disallowed (c).

II. *Of the Duty of Payment.*

In the case of a trust *inter vivos*, the estate is vested in the trustee for the benefit of all the creditors in debts contracted prior to the date of execution (d); consequently, it is not a good defence to a claim, made at any time before the final distribution, that the creditor had not given in his accession (e). Postponed creditors may attach the reversionary interest by adjudication directed against the trustor or his heirs—not against the trustee (f). If the reversion has been disposed of, they have no remedy against the estate (g). In trusts constituted by testamentary settlement for payment of 20s. in the pound on debts already discharged, the direction has been held to include all debts incurred prior to the testator's death; and there is no lapse though a creditor die before the testator (h). Sick-bed and funeral charges and mournings are preferable debts at common law (i).

Trusts for the payment of debts already discharged seem to be subject to the same rules of interpretation as onerous trusts for behoof of creditors. Thus, where a trustor burdened his heritable

Voluntary
Trusts con-
template the
benefit of
existing Cre-
ditors only.

Trusts for
payment of 20s.
in the Pound.

(a) *Macfarlane v. Cranstoun*, 12 Dec. 1823, 2 S. 578.

(b) Bell's Com. 1181 (5th Ed. II. 508).

(c) *Ure v. Miller*, 27 Jan. 1824, 2 S. 545; but see 1 W. & S. 565.

(d) Unlike a private trustee, who may pay *primo venienti*; see Chapter XVI. Sect. 3, p. 324, *supra*.

(e) *Innes v. Russell*, 1794, Bell's Fol. Cas. 27 and 8.

(f) *Barbour v. M'Minn*, 7 July 1826, 4 S. 806; *Herries, Farquhar, & Co. v. Burnet*, 20 Nov. 1846, 9 D. 111.

(g) See *Mackenzie v. Smith*, 26 June 1861, 23 D. 1201; *Turnbull v. Turnbull's Trs.*, 15 Apr. 1825, 1 W. & S. 80; *Wright v. Harley*, 2 June 1847, 9 D. 1151.

(h) *Cooper v. Mackenzie*, 13 Jan. 1860, 22 D. 380; *Watson v. Johnston*, 10 Apr. 1848, 6 Bell, 245.

(i) *Webster v. Alexander*, 15 Feb. 1859, 21 D. 509; *Glass v. Weir*, 23 Nov. 1821, 1 S. 163; *Douglas v. M'Clymont*, 11 Dec. 1802, Hume, 454.

estate with payment of "all just and lawful debts contracted by the said A. B., my son, and resting owing at his death, in so far as these debts shall not be extinguished during my life," the estate was held to be burdened with all debts of whatever nature due by the son, including the debts of the truster himself, for which the son was only liable subsidiarie (a). And where a party who had been in indigent circumstances, but afterwards came into an estate, conveyed it to trustees with a direction to pay all debts for which she was "bound in law or equity or in conscience," the Court held that this would include a recompense for aliment, as this was a debt for which the truster was under a natural obligation to grant a recompense (b). In another case, the debtor's widow had assigned the surplus rents of her own estate to trustees for behoof of her husband's creditors, on the understanding (which was not expressed in the deed of assignment) that the debts would be paid off in five years. It was held notwithstanding, that the creditors were entitled to apply the rents in extinction of their claims, until the whole debt had been paid off (c).

Where trustees have power, either by express grant or by implication, to sell heritage for the purpose of paying off debts affecting the estate, it has been ruled that it is their duty to execute the power, and not to allow the debt to remain a burden upon the property (d).

As to the effect of a trust for payment of debts in interrupting prescription, the principle, which is the same in both parts of the kingdom, is very distinctly stated by Mr Lewin (e), who observes, that while a trust will not revive a debt barred by the statute of limitations (f), yet, if the debt be not barred when the trust comes into operation, the statute will not run afterwards; for, as was observed by the Court in *Harper v. Wynne*, it is not to be inferred that a man abandons his debt because he does not enforce his claim

Trustee bound to exercise power of Sale where realized Assets are insufficient.

Does Trust for Creditors interrupt Prescription?

(a) *Stewart v. Campbell*, 6 Feb. 1852, 14 D. 443.

(b) *Easton v. Newlands' Trs.*, 17 Jan. 1822, 1 S. 244. See the following English cases on this class of trusts:—*Turner v. Martin*, 7 De Gex, M'N. & G. 429; *Sowerby's Trust*, 2 K. & J. 630; *Philips v. Philips*, 3 Hare, 281.

(c) *Rundell & Co. v. Montgomerie*, 15 Apr. 1825, 1 W. & S. 112, revg. 2 S. 207.

(d) *Graham v. Graham's Trs.*, 21 Dec. 1850, 13 D. 420.

(e) Lewin, Tr., 4th Ed. 357.

(f) *Burke v. Jones*, 2 V. & B. 275, where all the cases are collected.

at law when he has a trustee to pay for him (a). In the Scotch case of *Eccles v. Robertson* (b), where the amount of a bill debt was specified *inter cetera* in the deed of trust, it was held that the sexennial prescription had been interrupted by the debtor's acknowledgment; but in the later case of *Blair v. Horne* (c), where the names of the creditors only were specified in the deed of trust without mention of particular debts, and payment was to be made in two instalments of twelve and twenty-four months, the Court repelled the plea of interruption of prescription, in an action against the trustees upon certain promissory notes upon which prescription had not run at the commencement of the trust. In consequence of this decision (which we think unsound), creditors on bill debts of old standing cannot be recommended to become parties to private deeds of arrangement or composition contracts, unless they obtain an acknowledgment under the hand of the debtor or his trustee amounting to an effectual reconstitution of the debt.

Benefit of Trust cannot be restricted to Creditors acceding within a certain time.

Mr Bell has remarked, that it does not seem to be a valid condition of a trust professing to be in consideration of insolvency, that the benefit of payment shall be restricted to those creditors who enter their claim within a certain time (d); and his opinion has received confirmation from two recent Chancery cases, in which it was held by Vice-Chancellor Wood, and afterwards by Lord Chancellor Campbell, that a creditor who had not acceded within the prescribed time might claim the benefit of the trust (e).

Reversionary interest of Truster and of posterior Creditors.

After the purposes of the trust have been fulfilled, the truster is entitled, in virtue of his reversionary interest, to call upon the trustee to denude in his favour; and that right may be adjudged by posterior creditors. If the trustee should defer or become disabled from proceeding with the execution of the trust, there is a clear legal interest both in the truster and the creditors to enforce the

(a) *Hughes v. Wynne*, T. & R. 307, 309; *Crallam v. Oulton*, 3 Beav. 1, 9 L. J. Ch. 319; *Hargreaves v. Michell*, 6 Mad. 326; *Fergus' Exrs. v. Gore*, 1 Sch. & Lef. 107.

(b) *Eccles v. Robertson*, 15 Feb. 1833, 11 S. 397.

(c) *Blair v. Horne*, 30 Nov. 1858, 21 D. 45.

(d) Bell's Com. 1172 (5th Ed. II. 488); and see *Innes v. Russell*, 1794, Bell's Fol. Ca., 27 & 8.

(e) *Whitmore v. Turquand*, V.-C. Wood, 21 Dec. 1860, affd. 6 Mar. 1861; *Raworth v. Parker*, 2 Kay & J. 170; and see *Dunch v. Kent*, 1 Vern. 260.

fulfilment of the purposes by other means; which may be accomplished either by applying for the appointment of a factor, or by obtaining judgment in a declarator decerning the trustee to convey to a purchaser, or to another trustee to be nominated by the constituents (a).

As regards heritable property, if the title has been entirely taken out of the truster (which seems to be the effect of an *ex facie* absolute conveyance), a reconveyance or adjudication will be necessary to reinvest the granter; but a trust declared *in gremio* of the deed is regarded as a real burden, which may be extinguished by discharge, the granter's title meanwhile standing complete on his previous investiture (b).

Distinction between *ex facie* absolute Titles and Burdens.

A trustee for creditors denuding in favour of the truster while insolvent, is guilty of a fraud upon his constituents, and renders himself liable to an action of damages at the instance of any creditor whose claim has been neglected; the damage being measured by the amount which the pursuer might have recovered had the trust estate been made available to him (c).

Trustee cannot denude in fraud of Creditor's interest.

III. Of Composition Contracts.

Voluntary trusts for creditors are in the great majority of cases wound up by composition contract, which is in effect an agreement between the truster and his creditors, that the former shall, at a particular time or times, pay a definite proportion of all his debts, in consideration of which the debts are to be discharged. The contract is held to be qualified by the same implied conditions which enter into the constitution of trusts *omnium bonorum*: First, that all the creditors shall be dealt with equally (d); and secondly, that the accession of the individual creditor is only to take effect when all the rest have concurred (e). Composition contracts may either be constituted by deed, or, like other writings *in re mercatoria*, by

Conditions of the Contract.

(a) See *Allan v. M'Crae*, 1792, Bell's Oct. Ca., 538; *E. of Lauderdale v. E. of Fife*, 9 Mar. 1830, 8 S. 675.

(b) *Campbell v. Ederline's Cr.*, F. C. 1810, reported in Bell's Com. 1183 (5th Ed. II. 505); *Robertson v. Ainslie's Trs.*, 13 July 1837, 15 S. 1299.

(c) *Mackenzie v. Thomson*, 12 Nov. 1830, 8 S. 847; *Johnson v. Carson*, 20 Feb. 1823, 2 S. 203; *Freeland & Co. v. Finlayson*, 11 June 1823, 2 S. 344.

(d) *Aiiken v. Graham*, 8 July 1845, 7 D. 996; *Arrol v. Wight*, 29 May

a subscribed minute, which becomes binding upon its adoption by the grantee as the basis of a settlement (a).

Rule of Distribution where Fund insufficient for payment of Composition.

Before distributing the funds placed in his hands for payment of a composition, the trustee ought to satisfy himself that it is sufficient; for, if otherwise, he must either be content to pay a dividend upon the stipulated composition, or he must distribute the fund unequally, thereby exposing himself to liability in a personal action (b). In the event of a failure in the supplies before the distribution has been completed, it would seem that those creditors whose interests have suffered by the stoppage will not be entitled to an equalizing dividend out of any future funds that may be recovered (c). And if the creditors have granted an absolute discharge in anticipation of payment, they will only be entitled, on default in payment, to rank for the amount of the unpaid instalments (d).

Deed of arrangement in Bankruptcy.

The estates of sequestrated bankrupts may be wound up under a deed of arrangement or composition contract, without the debtor being subjected to the usual examination; but the machinery provided by the Act for winding up estates in this form is very imperfect, and a deed of arrangement is seldom resorted to in practice (e).

(a) See *Glass v. Mackintosh*, 12 May 1825, 4 S. 1.

(b) *Aitken v. Graham*, *supra*.

(c) Bell's Prin. § 1184.

(d) See *Goodsir*, 2 Montague, 222,

note; and *Peel*, 1 Rose, 435, cited in Bell's Com. 1184.

(e) Sec. 19 & 20 Vict. cap. 79; and 23 & 24 Vict. cap. 33, § 5.

CHAPTER XX.

OF CHARITABLE TRUSTS AND ENDOWMENTS.

IN the present chapter we shall consider a very important class of trusts, which, though the creation of individuals, are properly separated from ordinary private trusts, regard being had to their objects and contemplated endurance. The rules affecting these trusts are almost entirely dependent on the common law, the Legislature having abstained from that interference with Scottish Charities which is so marked in connection with those of England. Indeed, it would appear that, with the two exceptions, if such they are, to be immediately mentioned, the only statute dealing with them at all is the Act 1663, cap. 6, "against the inverting of pious donationes," which, on the narrative of the frequent inversion or misappropriation of grants to colleges, schools, hospitals, and other pious uses, provides that those entrusted with these grants shall be accountable to the beneficiaries, and that actions shall be competent at the instance of the beneficiaries, or the bishops and ordinaries within whose diocese the mortifications (a) lie, to compel them to administer the trusts according to the terms of the grants, and over and above, to account for the ordinary profits of every year's intromission "at the rate allowed by the laws of the realm." In a recent case (b), it was made matter of question, whether, under the 19 & 20 Vict. cap. 79, §§ 164-166, private trusts can be

Charitable
Trusts and
Endowments
regulated
mainly by the
Common Law.

Statute 1663,
cap. 6.

Bankruptcy
Act, 1856.

(a) *Mortification* was of old the kind of tenure by which lands were held when they were granted to religious houses or for other pious uses. These grants were made *ad manum mortuam*, i.e., as Prof. Menzies explains, "to a hand that could neither fight for the superior, nor transfer the grant." At the Reformation the tenure was abo-

lished, and all lands mortified for superstitious purposes were annexed to the Crown. Those granted for charitable and other benevolent purposes, however, were not annexed, and lands may still be mortified for any lawful purpose, to be holden feu or blench.

(b) Pet. *Tweedie*, 22 Jan. 1858, 20 D. 438.

brought under the superintendence of the Accountant in Bankruptcy, so as to obtain, at the public expense, a periodical audit of the trust accounts and exoneration of the trustees. The Court did not decide the point, but the opinions expressed were adverse to the competency of such a procedure.

Trustee Act,
1861.

It is an important and still unsettled question, whether the Act of last session (a) to amend the law in Scotland relative to the resignation, powers, and liabilities of gratuitous trustees, is applicable to the trustees of charitable institutions. The Act provides that "all trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated, shall be held to include the following provisions, unless the contrary be expressed; that is to say, power to any trustee so nominated to resign the office of trustee; power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees; a provision that the majority of the trustees accepting and surviving shall be a quorum; and a provision that each such trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions." Section *second* provides that nothing contained in the Act "shall affect any liability incurred by any gratuitous trustee prior to the date of any resignation or assumption under the provisions of this Act, nor any action at law commenced before the passing of this Act." Section *third* declares that "a gratuitous trustee shall, for the purposes of this Act, be held to be any trustee who receives no pecuniary or valuable consideration for performing the duties of a trustee, and *is under no obligation, without special acceptance of such office, to discharge the duties of trustee*: provided always, that nothing in this Act shall extend to any trustee appointed under the contract of any trading company." It is a question of considerable difficulty whether the statute can be held to affect *ex officio* trustees; for, with some show of reason, it may be maintained that no special acceptance of the trusteeship is ever necessary in their case. But on the other hand, as it would seem that individual members of a corporation, for example, may decline the trusteeship, their not declining, much more their acting in that character, might possibly be held to

Distinction between *ex officio* and private trustees of charities.

(a) 24 & 25 Vict. cap. 84.

constitute a special acceptance, and so bring them within the scope of the Act. There can be no doubt that the statute will apply to all charitable trustees who are not so *ex officio* merely.

Without attempting any very accurate division, it will be convenient to consider the subject of the present chapter under the following heads: 1. The constitution and construction of charitable trusts and endowments in perpetuity; 2. The duties and powers of trustees under them; 3. The liabilities of the trustees, and the remedies for breach of trust; 4. The Court's jurisdiction over the trustees; 5. Who may call the trustees to account? 6. The appointment of new trustees; 7. Resulting interests under such trusts; and, 8. Cases in regard to disputes as to church property.

Division of the Subject.

SECTION I.

CONSTITUTION AND INTERPRETATION OF CHARITABLE TRUSTS AND ENDOWMENTS.

The law of Scotland imposes few restrictions on the creation of perpetual trusts. The Mortmain Act (a) does not extend to Scotland at all, even where the money settled is invested in the British funds (b); and the Thellusson Act (c) which, as extended, prevents accumulations of the interest of real and personal property beyond twenty-one years after the testator's death, does not interfere in any degree with the testator's right to tie up the capital. It has been held that a direction to trustees to accumulate personal property in Scotland for a longer term does not defeat the trust altogether; but the accumulation will be limited to the period of twenty-one years (d).

In what terms an Endowment may be constituted.

In moving the affirmance of the judgment of the Court of Session in the case of *Hill v. Burns* (e), Lord Gifford observed: "It appears to me that the law of Scotland is more liberal in the interpretation of bequests for charitable purposes than other

Examples of implied Trusts for Charities.

(a) 9 Geo. IV. cap. 36.

(b) *Macara v. College of Aberdeen*, 1 Feb. 1786, M. 15946; Hailes, 975.

(c) 39 & 40 Geo. III. cap. 98; 11 & 12 Vict. cap. 36, § 41.

(d) *Ogilvie's Trustees v. Kirk-Session of Dundee*, 18 July 1846, 8 D. 1229. See Chapter VI., *supra*, p. 115.

(e) 14 Dec. 1824, 3 S. 389; *affd.* 14 April 1826, 2 W. & S. 80.

Uncertainty
obviated by
clothing the
the trustee
with discre-
tionary
powers.

bequests." The remark was well founded, as almost all the cases show. If they can possibly avoid it, the Courts will not hold a charitable bequest void for uncertainty. In the case already mentioned (a), a bequest to trustees in the widest terms, giving them the largest discretion in distributing certain funds among the charitable and benevolent institutions in the city of Glasgow, was sustained both by the Court of Session and the House of Lords. Lord Balgray said, "The whole case depended on the point, whether it was lawful for a testator to put the disposal of his property at the will and discretion of another? He thought it was." Again, a bequest in the following terms—"It is my wish that such remaining means and estate shall be applied in such charitable purposes, and in bequests to such of my friends and relations as may be pointed out by my said dearly beloved wife, with the approbation of the majority of my said trustees" (b)—was held not to be void for uncertainty.

Locality of
Trust may be
implied.

In another case (c), by a codicil to his trust deed, a testator left L.5000 for the maintenance of a school, in which boys were to be taught reading, writing, and arithmetic, "to be under the management of the magistrates, and ministers of the Established Church." No place was specified; but in respect that the truster was born, resided, and died in Glasgow, that his trust deed and codicil were dated and his trustees were merchants there, it was held that the bequest was not void for uncertainty, and that the "magistrates and ministers" referred to were those of Glasgow. The House of Lords, on the advice of Lord Wynford, adopted a different course in the case of *Ewen v. The Magistrates of Montrose* (d). There a testator having, in 1821, left L.6000 to found an hospital, and provided that that sum and the interest on it should be accumulated till it amounted to L. , and that the number of boys in it should be , the Court of Session sustained the bequest; the Thellusson Act preventing accumulations beyond twenty-one years. The House of Lords, however, reversed the judgment, and set the bequest aside on the ground of uncertainty. The authority of the

*Ewen v. The
Magistrates of
Montrose.*

(a) *Hill v. Burns*, *ut supra*.

Ministers of Glasgow, 30 Nov. 1827, 6 S. 186.

(b) *Crichton v. Grierson*, 12 May 1826, 4 S. 553; *affd.* 25 July 1828, 3 W. & S. 329.

(d) 5 Feb. 1828, 6 S. 479; reversed 17 Nov. 1830, 4 Wilson and Shaw.

(c) *Murdoch v. The Magistrates and* 346.

case has been frequently doubted,—as by Mr Boyle in his work on the Law of Charities (a), and by the House of Lords itself in the *Morgan* case (b). A bequest for “charitable and benevolent purposes” (c) was found not void for uncertainty; and much to the same effect was held in a subsequent case (d).

The well known *Morgan* case (e) is, however, probably the most remarkable instance of the favour which the law shows to charitable bequests. The case was of this nature:—The magistrates of Dundee claimed the establishment of an hospital in that town, under the following testamentary writings of the deceased John Morgan of Edinburgh:—

*Magistrates
of Dundee v.
Morris.*

“Edinburgh, 10 October 1842.—I hereby annul all hitherto written on the first, second, and third pages of this, and wish to establish in the town of Dundee, in the shire of Forfar, an [*an hospital strictly in size, the management of the interior of said hospital, in every way as Heriot’s Hospital in Edinburgh is conducted*],—the inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose; but inhabitants of any other county or town are excluded. JN^o. MORGAN.”

“I hereby wish only one hundred boys to be admitted in the hospital at Dundee [*and the structure of the house to be less than that of Heriot’s Hospital*], and to contain one hundred boys in place of one hundred and eighty boys. JN^o. MORGAN.”

“Edinburgh, 20 October 1842.”

The words printed in italics were deleted in the original writing, but the deleted words were still legible. The Court of Session refused to spell a will out of these writings, the words of which Lord Murray said were “mere scratches, *rari nantes in gurgite vasto*.” But the House of Lords adopted a different view, and taking as their guide “the principle of a benignant construction of charitable bequests,” their Lordships first sustained the writings above quoted as constituting a will, and then held that the will was not void for uncertainty. The mixed process of reasoning and conjecture by which

Benignant
construction of
Charitable
Trusts.

(a) Boyle on the Law of Charities, Feb. 1836, 14 S. 555; affd. 14 July 1837, 2 S. & M'L. 866.

(b) *Magistrates of Dundee v. Morris* & *Others*, 26 June 1857, 19 D. 917; reversed 11 May 1858, 3 Macq. 134. (d) *Dundas v. Dundas*, 27 Jan. 1837, 15 S. 427.

(c) *Black’s Trustees v. Miller*, 23 (e) *Magistrates of Dundee v. Morris* & *Ors.*, *ut supra*.

Opinion of
Lord Chelms-
ford, Ch.

this result was arrived at, is both curious and instructive. Thus the Lord Chancellor Chelmsford remarked (a):—"But then it is said that there is nothing to indicate the class of boys for which the hospital was to be provided, nor anything to lead to any conclusion as to whether they were to be merely educated, or to be also boarded and lodged. Now, as to the class of boys, they were described with sufficient precision by reference to the inhabitants born and educated in Dundee and the other three towns, by which I understand, not the persons themselves who were residents and who had been born and educated there, but the sons of such persons,—a qualification which, though it might embrace inhabitants of different stations and degrees in society, is yet sufficiently definite to admit of a clear and certain application. Nor can I entertain any doubt of the intention of the testator, that the children should be maintained as well as educated; because they were not to be confined to the town of Dundee, but were expected by him to come from other and distant towns, and would require therefore to be lodged and fed in the intended hospital. There may be some doubt whether they were also meant to be clothed. But any uncertainty as to these minor details would not have the effect of defeating his main purpose, any more than his silence as to the description and character of the education which was to be provided for them. But it was strongly urged upon your Lordships in the course of the argument, that the testator had not specified any certain sum, nor furnished any means for rendering certain how much was to be applied to the establishment of the hospital." . . . "Here," his Lordship continued (b), "the place of the hospital is defined—the town of Dundee. The size also of the hospital can be easily ascertained, as it is to be for 100 boys. And there would be no difficulty, therefore, in applying the testator's property, not to a mere vague and indefinite object, but to one expressed with sufficient certainty to be capable of being carried out. To this object it appears to me that it was the intention of the testator to devote the whole of his property, or such a competent part of it as might be sufficient for the purpose."

Lord Cran-
worth's
opinion.

Lord Cranworth carries on the process, and fixes the class of boys thus:—"Then the class of persons. That is, to a certain

(a) 3 Macq. 156.

(b) 3 Macq. 159.

extent, no doubt vague; but it must be a class from those three or four provincial towns who would be reasonably supposed to seek the benefits of a gratuitous education. I think that is sufficiently certain" (a). Lastly, Lord Wensleydale clothes and houses the recipients of the charity, while he provides an endowment for the hospital. "From the use of the word 'hospital,' which is certainly connected with the relief in some way of the poor, it may be collected that they were to be supplied with necessaries, clothing included; and finally, as this bequest was for the establishment of the hospital, there must not only be buildings, but an endowment" (b).

Lord Wensleydale's opinion.

It may be presumptuous to suggest that much of this is very fanciful, and that the principles on which such a mode of construction rests, are somewhat dangerous. Be that as it may, there can be no doubt that the *Morgan* case will be followed as a precedent. Its influence was observable in a recent decision of the First Division (c). A testator, who had executed a tested deed in favour of certain trustees giving funds to various charities, afterwards deleted the provisions to certain of the charities, marking them *cancelled*, and signing the cancellation. He also deleted the names of the trustees, writing on the margin opposite the deletion, "Managers of the Edinburgh Royal Infirmary for the time being," and signing the marginal addition. In a holograph codicil he said, "I hereby appoint the Managers of the Edinburgh Royal Infirmary for the time being my sole executors and trustees." The Court held that the managers were properly substituted as trustees, and that the conveyance to the Infirmary was good. No opinion was given as to how it would have been if no new trustees had been named, or whether, in the case of heritable property, if the names of the trust disponees had been rendered a total blank, the trust could have been sustained, the Court naming trustees or a factor.

Influence of the *Morgan* case on the law of Charitable Bequests.

Edinburgh Infirmary case.

Where an evident clerical error has been made in the nomination of the trustees, or where circumstances have altered since the date of the trust deed, the Court will interpose, and take care that as far as possible the intentions of the truster shall have effect. Thus, where in a trust deed one of the *ex officio* trustees was styled the

Mistakes in the Designation of the Trustees.

(a) 3 Macq. 166.
(b) 3 Macq. 171.

(c) *Royal Infirmary of Edinburgh*
v. *Lord Advocate*, 20 June 1861, 23
D. 1213.

"Moderator of the city of Aberdeen," while it was obvious that the "Moderator of the Synod of Aberdeen" was meant, the Court, in an action of declarator, rectified the mistake; declaring, however, that they did not do so in the exercise of any prætorian power (a).

To what extent the execution of a trust *Cy-pres* is admissible.

The recent case of *Duff's Trs. v. The Lord Mayor of London* (b), decided in the Outer House, came very near to, if it did not go the whole length of, recognising the equitable doctrine of *cy-pres*. The testator bequeathed a fund to be divided in equal proportions between the "Societies of Scripture Readers" in certain towns, and, *inter alia*, in Dundee and Inverness; and Lord Jerviswoode sustained the claims of two societies, called the "Inverness Scripture Reading and Tract Distributing Society," and the "Dundee City Mission Association;" for, said his Lordship, "seeing that there are no competing claims from these towns, and having reference to the character of the bequest, he is of opinion that he is acting within the true intention of the testator in sustaining the claims to the extent specified in the interlocutor." We see no reason to doubt that the Court of Session, as a Court of equity, has power to carry into effect a testator's intention, although it should be necessary, in doing so, to entrust the administration of his bequest to a society which may not exactly answer his description, but whose constitution enables it to carry his benevolent wishes into execution.

Bequests to official persons as Trustees.

It has been decided that bequests to official persons are good though they are not a corporation, and that their successors in office succeed them as trustees (c).

Gordon's Hospital case.

The founder of an hospital in Aberdeen named as patrons the Magistrates, Town Council, and "four Ministers, commonly called the Town's four Ministers of the Old and New Churches, and their successors in their respective offices," their being only two collegiate churches and four ministers at the time. The burgh being afterwards divided into six parishes, having each a single clergyman, the Court held that only four ministers could be patrons, two of them always being the ministers of the churches referred to in the deed of mortification, and the others being chosen according to the

(a) *Synod of Aberdeen v. Milne's Trs.*, 25 Feb. 1847, 9 D. 745.

(b) *Duff's Trs. v. The Lord Mayor of London*, 18 Mar. 1862 (not yet reported). A similar decision was pro-

nounced by Lord Ivory in *Bethune v. Cameron*, 15 Mar. 1843, noticed in Forsyth on Trusts, p. 403.

(c) *Macara v. College of Aberdeen*, 1786, M. 15946, Hailes, 975.

seniority of their appointment as town's ministers, or if they were coeval in that respect, then by their seniority as licensed clergymen (a). Again, by George Heriot's will, the governors of his hospital were the Provost, Magistrates, and ordinary Council of Edinburgh, and the Ministers thereof for the time being. At the date of the foundation, certain representatives of the Incorporated Trades were constituent members of the Council, but they lost their rights as such by the Burgh Reform Act. The Court held that, in ceasing to be members of the Council, they had also lost their right to the governorship of the hospital (b). In delivering his opinion, the Lord President Hope alluded to the circumstance, that since the foundation of the hospital the ministers of Edinburgh had become Presbyterians, from being Episcopalians, and had increased in number from eight to eighteen, and yet all of them were entitled to act as governors.

A bequest made, prior to the Poor Law Amendment Act (c), "to the minister and kirk-session of the parish of Bathgate for the time being, for the benefit and behoof of the poor in the said parish," includes both able-bodied and legal poor, and does not fall under the 52d section of the statute (d).

Bequests for
the benefit of
the Poor.

A testator domiciled in Jamaica, named as his trustees to administer a charity in Scotland, five heritors of the parish which was to benefit by the bequest, "their heirs and assigns." The Court held that the trusteeship was hereditary in the family of each heritor, and was not to be restricted to the heir of the last survivor of the original trustees (e).

In England, charities are not less favoured objects in the eye of the law than they are with us. Of this no better proof could be adduced than the existence of the well-known doctrine of *Cy-près* (or approximation). In treating of this doctrine, Mr Boyle says (f), "If charity be the general, substantial intention, though the mode by which it is to be executed fails through accident or other circumstances, the Court will find some means of effectuating that general

Doctrine of
Cy-près.

(a) *Governors of Gordon's Hospital v. Ministers of Aberdeen*, 8 July 1831, 9 S. 909.

(c) 8 & 9 Vict. c. 83.

(d) *Liddle v. Kirk-Session of Bathgate*, 14 July 1854, 16 D. 1075.

(b) *Incorporated Trades of Edinburgh v. Governors of Heriot's Hospital*, 3 June 1836, 14 S. 873.

(e) *Ferguson v. Marjoribanks*, 1 April 1853, 15 D. 637.

(f) Boyle on Charities, 147 *et seq.*

Doctrine of
Cy-pres.

intention (a). In resorting, therefore, to the principle of *cy-pres*, the Courts have been guided by a supposed discovery of intention, on the part of the donor, to devote the subject of his gift at all events to charity, and to deprive his representatives of every claim to the property. Upon this supposed indication of the donor's will, such obstructions as may occur in the course which he has himself pointed out are not allowed to arrest, but merely to turn aside the flow of his bounty; whilst, if no course has been perceptively directed by him, a channel, by which his charity may be rendered both beneficial and useful, will be marked out by the Court. Thus it is well established, that where the donor has left the selection of objects, as in some cases; of the mode, as in others; and of the charities themselves, as in a third class of cases; to individuals who afterwards become incapable of executing the office confided to them, the Court will take upon itself to act in their stead (b). It would indeed be difficult to advance any proposition which is more firmly established in Courts of equity than that a trust shall not be allowed to fail for want of a trustee; and although, in several instances, where a charitable gift has had to be executed *cy-pres*, it has been sought to have limits assigned to that proposition, yet the rule has been invariably acted upon." It would be in vain to examine in detail the various modifications of this doctrine and the manner in which it has been applied by the English Courts. A very large portion of Mr Boyle's Treatise on Charities is devoted to an examination of these, and to it therefore we must refer (c).

SECTION II.

THE DUTIES AND POWERS OF THE TRUSTEES.

I. Duties of the Trustees.

Intention of
the Settlor to
be carried out
so long and
so far as prac-
ticable.

The leading *duty* of the trustees, and the only one which we shall consider here, is to carry out the purposes of the trust so far and so long as these are practicable. A very good illus-

(a) *Att.-Gen. v. Earl of Winchelsea*,
3 B. C. C. 379; *Att.-Gen. v. Minshall*,
4 Ves. 14; *Moggridge v. Thackwell*, 7
Ves. 69, 82.

(b) See 7 Ves. 78.
(c) Boyle, 147-280.

tration of this is supplied by the case of the *Magistrates of Edinburgh v. the Professors of the University* (a), relative to the trusts created by General Reid in favour of the University. The General conveyed his personal property, amounting to about L.60,000, to trustees, "in the first place, for establishing and endowing a Professorship of Music in the College and University of Edinburgh, where I had my education, and passed the pleasantest part of my youth; and in the next place, for the purpose also, after completing such endowment as hereinafter is mentioned, in making additions to the library of the said University, or otherwise in promoting the general interest and advantage of the University, in such way and manner as the Principal and Professors thereof for the time being shall, in their discretion, think most fit and proper." The only express provision in the trust deed, as to the endowment of the chair, was a declaration that the salary of the Professor should not be fixed at less than L.300. The Senatus, who were the trustees, fixed the salary at the minimum, and admitted their obligation to set apart and invest a fund sufficient to meet it; but they contended that they were entitled to dispose of the remainder of the fund bequeathed, as falling under their discretionary power of administration, for behoof of the University. The Court refused to sanction this contention. Lord Fullerton said, "The whole settlement must be read together, and read, if possible, so as to support rather than frustrate the intention of the testator." Acting on this principle, their Lordships reviewed the trust deed in great detail, and, being of opinion that, as the Lord President Boyle expressed it, "General Reid, an enthusiastic lover of music, and himself a composer, had primarily in view the establishment, on a permanent foundation, of a Professorship of Music in the University of Edinburgh, where none before existed," they held that the Senatus would not discharge themselves of their trust by simply providing a fund for the payment of the Professor's salary, but that they must in addition set apart and invest funds sufficient to provide the Professor with the means of efficiently teaching the science of music. In consequence of this decision, a class-room has been built and apparatus procured for the Professor of Music, at the expense of several thou-

*General Reid's
Bequests.*

(a) *Mags. of Edinburgh v. Principal and Professors of University of Edinburgh*, 20 June 1851, 13 D. 1187.

sand pounds in addition to the sum set apart to secure the salary. Mr Lewin notices (a) a case very similar to this, in which, "where trustees were directed to apply the rents towards the necessary finding a master, and for the pains of such master," and "the trustees applied part of the revenue towards rebuilding and repairing the school-room and school-house, it was held to be a good pursuance of the trust, because a school-room and house were necessary; and if these were not provided by the trustees, they must have been provided by the master himself, and so it was in effect applied for the pains of the master" (b).

Purposes of the Settlement cannot be controlled by adverse usage.

It has been settled by a train of decisions, that although for a long series of years trustees have acted upon a construction of the trust deed which turns out to be erroneous, that will not entitle them to continue to act upon it after the error is discovered (c). In the old case of *The College of Aberdeen v. the Town* (d) it was so held, and the doctrine has scarcely been doubted since. Where a bequest was left by a lady in England to a particular district of the parish of Cardross, to be under the management of "the patrons or overseers of the poor of said place," it was held that it fell to be administered by, *inter alios*, the whole heritors of the parish, even although for eighty years none but the heritors in the particular district had acted under the trust (e). In this case, the Court held that to certain effects a parish is a corporation, consisting of the minister, heritors, and kirk-session, all of whom are entitled to vote *per capita*. It was on this footing that they held the whole heritors entitled to participate in the administration of the bequest. It is probable that such a bequest would now, under the provisions of the Poor Law Amendment Act (f), fall under the management of the Parochial Board of the parish.

Quære as to matters of mere Administration.

In the case of *Leslie v. Black* (g), the Court appear to have ignored the principle with which we are at present dealing. Under a deed of mortification, certain persons were the patrons along with "the minister and remanent members of the kirk-

(a) Lewin on Trusts, 4th Ed. 373.

(b) *Att.-Gen. v. Mayor of Stamford*, 2 Swans. 592.

(c) See, in addition to the cases noted *infra*, *Cairncross v. Lorimer*, 3 M'Q. 832, per Lord Kingsdown.

(d) *Coll. of Aberdeen v. the Town*, 24 June 1675, 1 Br. Sup. 552 and 737.

(e) *Earl of Galloway v. Kirk-Session of Dalry*, 22 Feb. 1810, F. C.

(f) 8 & 9 Vict. c. 83.

(g) *Leslie v. Black*, 9 June 1814, F. C.

session of Largo." For a very long period, the kirk-session voted collectively by a delegate. Having claimed a right to vote *per capita*, the Court refused to allow them to do so, as the report states, "being chiefly influenced by the long consuetude." This decision, although it only went to affect the machinery of the trust, without touching the beneficial interest, seems erroneous in principle; and the precedent has not been followed.

For example, in 1681, a person of the name of Ramsay mortgaged certain lands for the education and entertainment of *three* youths for a certain number of years in the United College of St Andrews; and he provided, that "what shall be over and above the entertainment of the foresaid youths and payment of their regents, it shall be bestowed entirely upon the said youths in three proportions, for buying of books and other necessaries." In 1784, the value of the mortgaged lands having considerably increased, the patron of the bursaries, Sir Alexander Ramsay, entered into an agreement with the Principal and Professors of the United College, to the effect that the number of the bursaries should be increased so as to give one for every L.20 of income from the mortification. This agreement was acted on down to 1840, when there were *thirteen* bursars on the fund, each drawing L.20 a year. In 1840, Sir Alexander Ramsay, the then patron, brought a reduction of the agreement (a), on the ground that it was in violation of the will of the founder. The College pleaded prescription and personal bar, and also that the agreement was no more than a wise and beneficial adaptation of the original regulations to the improved state of the mortgaged fund; but the Court refused to listen to these pleas, and, setting the agreement aside, found that the whole revenues must be expended on *three* bursars. The Lord Ordinary (Cockburn) observed in his note, that he could not "bring himself to think that the doctrine either of prescription or acquiescence, or even of positive and personal ratification, can apply to such a case. These doctrines may affect parties managing *their own interests*, but they do not apply to *trustees*—the responsible managers of a private charity instituted for public purposes, who can claim no right to violate their duty in time to come by having violated it in time past." Lord Fullerton said, "It is impossible to hold that any lapse

Case of the
Ramsay bur-
saries.

(a) *Sir A. Ramsay v. The United Col. of St Andrews*, 7 June 1842, 4 D. 1366.

Enforcement
of Trusts
created by
Voluntary
Association.

of time can sanction and secure the continuance of a violation of duty by the administrators of a trust" (a).

There is a class of cases which fall naturally to be considered under this head; those, namely, in which it has been settled that where a number of persons form an association, and subscribe funds for carrying out a particular purpose, any one of the subscribers has a sufficient *jus quasitum* to entitle him to prevent a dissolution of the association, and to compel the trustees to proceed in the execution of the original purpose so long as that is practicable. On the other hand, where the scheme is eventually frustrated by the failure of the project, either totally or in any particular which can be considered as essential, the minority, or even an individual member, may insist on the dissolution of the association, and the division

(a) The difficulties which are inseparable from the consideration of this class of cases have been increased by the distinction taken, in the recent case of *Baird v. The Magistrates and Council of Dundee*, 5 Feb. 1862, 24 D. 447, between questions of title and questions of trust. To explain this decision, it is necessary to observe that in a suit previously instituted to enforce the administration of certain property and funds, entitled the Hospital Fund of Dundee, the House of Lords, affirming the judgment of the Second Division of the Court of Session, found that the revenues of this fund were applicable to certain purposes, inclusive of the support of the ministry in Dundee, but with a declaration that the subjects called "Monorgan's Croft" had been purchased A.D. 1646, with money left by Robert Johnston as a legacy to the Provost and Bailies of Dundee, "for the yearly maintenance of the aged and impotent people of the town of Dundee" (24 July 1861, 33 Scot. Jur. 707, affg. in part 20 D. 849). An action having been raised to determine whether the revenues of this croft were not still subject to the trusts of Johnston's will, the Lords of the First Division (*dissentiente* Lord Deas) held

in point of fact, that the legacy had never been intromitted with by the Provost and Bailies, the trustees of the legacy, but by the Provost, Magistrates, and Town Council, who (but whether in their corporate capacity, or as trustees of the hospital fund, is not quite clear) took possession of the money, and invested part of it in the purchase of Monorgan's Croft, taking the title in the name of the Hospital Master of Dundee, "for the special use, behoof, utilitie, and profit of the poor of the said hospital." Their Lordships decided, that in consequence of the appropriation of this fund to the purposes of the hospital for two centuries without challenge, the right to sue for fulfilment of Johnston's trust had been cut off by the negative prescription; and they were also of opinion that the title of the Hospital Master had been validated by the positive prescription; so that the beneficiaries could have no relief either by personal action, or against the estate. This decision can only be supported on the ground that the title of the present administrators of the charity was in its inception clear from the trusts of Robert Johnston's will. For, suppose the legacy had been left to the Provost, Magistrates,

of its funds. Both these points were very clearly established in the well-known case as to the Glasgow Chapels (a); and they are brought out with more or less clearness in various subsequent cases (b). In the case of *Bain*, Lord Cottenham, Ch. (c), expressed a doubt whether, if the Court should be of opinion that the purposes of an association had failed, and that it must be dissolved, there were any means short of an Act of Parliament by which the funds could be distributed among the subscribers. Lord Campbell (d) suggested the raising of a multiplepinding, but hesitated to say that even that useful form of action would be adequate for the purpose.

Bain v. Black.

The law of England in regard to the duties of charitable trustees is the same as that we have just been noticing. "It is of course imposed upon the trustees," writes Mr Lewin (e), "whether individuals or a corporation, not to convert the charity fund to other uses than according to the intent of the founder or donor, so long as those uses are capable of execution."

English doctrine as to enforcement of purposes.

and Council, the present proprietors of Monorgan's Croft, it is clear that in that case the parties interested in the hospital trust, having no written title, legal or beneficial, to the croft, could not object to the contemplated reconversion of its revenues to their legitimate uses; while the legal proprietors, the corporation, being confessedly mere trustees of the estate, would be barred by want of interest from founding on any prescriptive possession adverse to the interests of their constituents. Even in the actual state of the title, we incline to think, with Lord Deas, that the trust might have been enforced. The statutes relative to prescription apply only to questions as to the possession of the legal estate. In that view, the Provost and Bailies would be excluded from any right to dispossess the Provost, Magistrates, and Town Council, whose title as legal proprietors and administrators of the charity was certainly fortified by prescriptive possession. But supposing the transaction for the conveyance of

Monorgan's Croft to the hospital trustees to have been truly a devolution of the trust to the latter body, and not a fraudulent appropriation of the bequest to the general purposes of the hospital, we think that parties so assuming to themselves the office of trustees would be bound by the conditions of the trust, in the same degree as other trustees, whether named by the testator or by the Court.

(a) *Bain v. Black*, decided 17 Nov. 1846, reported 12 July 1849, 11 D. 1286; affd. 22 Feb. 1849, 6 Bell, 317.

(b) *Presbytery of Fordyce v. Shanks*, 14 July 1849, 11 D. 1361; *Connell and Others v. Ferguson*, 6 Mar. 1861, 23 D. 688. See also *M'Caskill v. Cameron*, 6 Feb. 1840, 2 D. 537; and *Steedman v. Malcolm and Ors.*, 24 June 1842, 4 D. 1441.

(c) *Bain v. Black*, 22 Feb. 1849, 6 Bell, 317; see 329.

(d) 6 Bell, 335.

(e) Lewin, 367; and see cases cited by him, pp. 367 *et seq.*

II. Powers of the Trustees.

We shall now consider shortly the *powers* of the trustees of Charitable Trusts, in so far as these are exceptional or peculiar.

Discretionary Powers suffice to effectuate an indefinite Trust.

It is no objection to a trust deed, that the powers conferred by it upon the trustees are of the most unlimited character. We have elsewhere pointed out, that the object of the trust must be rational and workable (*a*), and must be declared, if not in express terms, at least in such a manner that the purpose may be deduced inferentially (*b*); for the enforcement of a trust which is wholly uncertain as to the object, is of course impossible. A trust for objects of a general and comprehensive character, such as the promotion of a particular science (*c*), or religious persuasion (*d*), or the relief of deserving objects of charity in a given locality (*e*), may be effectually carried out by giving large discretionary powers to the trustees, which are not regarded as arbitrary powers, but as discretionary trusts, the execution of which may be regulated and controlled by the Court of Session.

Power of selecting Objects from a Class.

These principles are clearly established by the cases of *Hill v. Burns* (*f*), and *Crichton v. Grierson* (*g*), already mentioned. In the last of these cases, the Lord Chancellor (*h*) said, "A party may, in the disposition of his property, select particular classes of individuals and objects, and then give to some particular individual a power, after his death, of appropriating the property, or applying any part of his property, to any particular individuals among that class whom that person may select and describe in his will." Again, the late Dr Bell left certain sums to the Magistrates and Council of St Andrews, "the interest and produce thereof to be by them applied towards the moral and religious improvement of that city, and such other useful permanent works connected therewith as the said last-mentioned Provost, Magistrates, and Town Council

"Moral and Religious Improvement" of specified locality.

(*a*) Chapter VI. (Trust Purposes). The latest case on inextricable trusts is *Mason v. Skinner*, 6 Mar. 1844, 16 Jur. 422.

(*b*) *Supra*, p. 423-8, and Chapter VIII. (Implied Trust).

(*c*) *Mags. of Edinr. v. University of Edinr.*, 20 June 1851, 13 D. 1187.

(*d*) Boyle, 41-4.

(*e*) See the cases on charities noted *infra*.

(*f*) *Hill v. Burns*, 3 S. 389, and 2 W. & S. 80; *supra*, p. 423. See *Milne's Trustees v. Cowie*, 1 Feb. 1853, 15 D. 321.

(*g*) *Crichton v. Grierson*, 4 S. 553, and 3 W. & S. 329; *supra*, p.

(*h*) Lord Lyndhurst, 3 W. & S. 338.

shall from time to time, under the superintendence and with the approbation of the Lord-Lieutenant for the time being of the county of Fife, and the said trustees, or the survivors of them (certified by writing under their hands), direct." The Court held (a) that the moral and religious improvement of the city constituted the primary purpose of the bequest, and that the Magistrates and Council were entitled, "at their own hands," to vote sums for such moral and religious purposes. They were further of opinion that the "other useful permanent works" need not be connected with the moral and religious improvement of the city, but that appropriations for them must be made with the separate consents of the Lord-Lieutenant and a majority of the trustees, certified by writings under their hands.

The law of England would seem to be as liberal as our own in sustaining trusts, notwithstanding the unlimited discretion which they may confer on the trustees. Thus Mr Boyle says (b), "It is to be remarked, with reference to this class of gifts, and indeed to all others of a charitable nature, that there is no need of any particular persons or objects being specified, the utmost latitude and generality being allowed in this respect. To a certain extent, indeed, it seems essential that dispositions of this kind should be of an indefinite character, it being frequently their very generality which constitutes them charitable."

Doctrine of
the English
Law.

Although, as we have had occasion to remark, trustees cannot go against the expressed or implied directions of the truster, from the very nature of their office they have the power to make such alterations on the mode of administering the trust as will not defeat it in any essential particular. Thus, where a mortification was made for keeping idle boys at work by employing them in a *woollen* manufactory, it was decided to be no inversion or misappropriation of the funds to employ them in a *linen* manufactory (c). A bequest was left to "the Farmers' Society of East Salton, which I have been the means of forming," the interest only to "be employed in premiums for the encouragement of agriculture, or any beneficial purpose connected with it." After the testator's death the Salton Club,

Extent to
which change
in the applica-
tion of the
Fund is per-
missible.

(a) *Town Council of St Andrews v. Dr Bell's Trustees*, 17 July 1845, 17 Scot. Jurist 583.

(b) Boyle, 24, and cases there cited.

(c) *Town of Edinburgh v. Binning*, 22 Nov. 1698, M. 9109. But see *Bonar v. Christian Knowledge Soc.*, 10 Mar. 1846, 8 D. 666.

by a majority, joined the Haddington Society, the united Club being called "The East Lothian Agricultural Society;" and out of five meetings yearly it was agreed that two should be held at Salton. Pringle and the rest of the minority, who refused to unite, claimed the bequest; but the Court gave it to the East Lothian Agricultural Society, which they held to be merely an extension of the Salton Society, coming to that opinion the more easily, that the latter Society had not confined its exertions to a local district (a). The existence of the power which we are now considering, and the limits which the Court put upon it, are well brought out by a comparison of the cases of *Forbes v. The Magistrates of Glasgow* (b), and *Davidson v. Macgregor* (c), in which acts in pursuance of the powers were sustained, with the cases of *Ramsay v. The College of St Andrews* (d), and *Ramsay v. Brewster* (e), in which the proceedings were held to be in excess of the powers. Where the deed of mortification was silent as to the period for which a bursary was to be held, it was decided that the original statutes or universal usage of the College might be looked to as settling it; but if there was no statute and no universal usage on the point, then that it fell to the patron to determine it (f). Again, where the number of bursaries under a mortification was not fixed, it was held within the power of the trustees to diminish their number, without consulting the magistrates of the burgh, who had immemorially presented to them (g).

Investment of
the Trust
Funds.

The powers of trustees generally to *make investments* have been already fully considered (h), and it is unnecessary to treat of them as affecting the particular class of trustees with which we are at present dealing. It may be sufficient here to refer to two cases. The first was a case (i) in which the trustees of a mortification, having obtained an Act of Parliament authorizing them to sell lands and houses of which they had the *dominium utile*, and buy other lands,

(a) *Pringle v. The M. of Tweeddale*, 16 Dec. 1823, 2 S. 588. See *Craigie v. Marshall*, 12 D. 522.

(b) *Forbes v. Mags. of Glasgow*, 21 Feb. 1837, 15 S. 628, & 13 June 1839, Macl. & Rob. 530.

(c) *Davidson v. M'Gregor*, 27 Feb. 1850, 12 D. 789.

(d) *Ramsay v. United College of St Andrews*, 7 June 1842, 4 D. 1366.

(e) *Ramsay v. Brewster & Others*, 20 July 1859, 21 D. 1367.

(f) *Playfair v. United College of St Andrews*, 13 July 1850, 12 D. 1234.

(g) *Mags. of Lanark v. Trs. of Battiesmain's Mortification*, 17 June 1852, 14 D. 876.

(h) Chapter XVI. Section 4.

(i) *Govs. of Cauvin's Hospital*, 29 Jan. 1842, 4 D. 556.

were held not entitled to buy feu-duties; Lord Mackenzie (a) putting it a good deal on this, that feu-duties may fall off, but cannot increase in value like land. The other was a case (b) in which a testatrix had directed her trustees to place a sum in the public funds sufficient to pay certain fixed annuities, amounting together to L.50 a year. Although it was obvious, that if the Government rate of interest were reduced, the purchase might not always produce the L.50, Lord Gillies said (c), with the approbation of the Court, "As the law regards such an annuity at present as a perpetual annuity, I think that the purchase of it would sufficiently implement the will of the testator. And in any view, the mere possible contingency of this annuity at some future period falling below L.50, is one which must have affected many cases similar to this, and does not seem to require to be provided for by the Court."

The right of the trustees under a mortification to grant leases of the mortified lands was first settled in the case of the *Town of Edinburgh v. Binning* (d), already mentioned. It has never since been doubted. In England there would seem to have been a great many cases in regard to the particular manner in which the trustees may exercise this power; as, for instance, that governors of charities cannot grant leases to one of themselves (e); that they should be cautious how they grant leases to their own relations (f); that they may take *finēs* (*grassums*, as we should call them) or *rents*, as may be most beneficial to the charity (g); that the leases must be for an adequate consideration, else they may be cancelled (h); that if the lease is of an unreasonable endurance, it may be set aside on that ground (i). It is not necessary, however, to go into these questions here; but reference may be made to Mr Lewin's work, where they are all fully discussed (k).

Leases of
Trust Lands.

We have next to consider the power of the trustees to sell the trust subjects. Whether particular trustees have or have not this

Powers of
Sale.

(a) 4 D. 557-8.

(b) *Ballantine v. Mags. of Ayr*, 17 Jan. 1838, 16 S. 325.

(c) 16 S. 330.

(d) *Town of Edin. v. Binning*, 22 Nov. 1698, M. 9109.

(e) *Attorney-Gen. v. Dikie*, 13 Ves. 519; *Attorney-Gen. v. Earl of Clarendon*, 17 Ves. 491.

(f) *Ferraby v. Hobson*, 2 Phill. 261; *Ex parte Skinner*, 2 Mer. 457.

(g) *Attorney-Gen. v. Mayor of Stamford*, 2 Swans. 592.

(h) *Attorney-Gen. v. Morgan*, 2 Rus. 306.

(i) *Attorney-Gen. v. Brooke*, 18 Ves. 826.

(k) Lewin, 375 et seq.

power, will always mainly depend on the language of the trust deed under which they act. It will also depend to some extent on the circumstances of the trust at the period when the question arises. In one case (a) it was decided that the trustees of a charitable institution who held lands of the Crown, were entitled to sell the superiority for the benefit of the trust. This was permitted partly, no doubt, because the price offered was a very large one; for in another case (b) it was held that trustees could not alienate such superiority gratuitously, or without adequate value. But the Court were probably also influenced by the consideration, that a superiority was at that time comparatively valueless, whilst it remained united to the *dominium utile* in the person of the trustees; and that it was only when separated and offered for sale that it acquired value at all. At all events, the Court have now laid it down as a settled principle, following the decision of the House of Lords in *Allan v. Glasgow's Trs.* (c), that where the trust deed does not confer on charitable trustees power to sell the trust subjects, they will not supply that power unless its exercise would be not only *beneficial*, but absolutely *necessary* for the due administration of the trust (d).

Construction of
Special Powers
of Sale.

The same principle was recognised in two other cases (e), in regard to the sale of church sites and buildings; but in both of them it is proper to explain, that the trustees were held bound to invest the price they obtained in the purchase of new sites and erection of new churches, which thus came to be a sort of *surrogata* for the old. In the case of the *Magistrates of Airdrie v. Airdrie Chapel Committee* (f), it was decided that persons who held the double position of being members of a chapel committee and also trustees of a school, erected partly from public subscriptions and partly from the funds of the chapel committee, had no right to sell, for payment of chapel debts, the school buildings, the title to which had been taken by the committee to themselves and their successors, for the "use of a

(a) *Moore's Trs. v. Wilson*, 25 June 1814, F. C.

(b) *Christie v. Mags. of Stirling*, 6 July 1774, M. 5755.

(c) *Allan v. Glasgow's Trs.*, 7 Mar. 1832, 10 S. 438, 2 S. & M'L. 333.

(d) *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 914.

(e) *Johnston v. Mags. of Canongate*, 30 May 1804, M. 15112; *Presbytery of Aberdeen v. Cooper & Others*, 20 Mar. 1860, 22 D. 1053.

(f) *Mags. of Airdrie v. Airdrie Chapel Committee*, 13 July 1850, 12 D. 1222.

public school or seminary in all time coming." In England the sale of charity property is now entirely regulated by statute (a), the Commissioners of Charities being empowered to authorize sales, and the trustees being prohibited from selling without their sanction.

The power of the trustees to *borrow*, rests to a large extent on the same grounds with those just stated as to their power to sell. Accordingly, where the power is not expressly given by the trust deed, they will not be allowed to exercise it merely because it would be beneficial, but only if it is necessary for the administration of the trust (b). The cases, however, would seem to show, that where the income from the trust fund is at a particular date inadequate for the proper execution of the trust purposes, the trustees may, in the course of fair management, lay some burdens upon the fund itself, in the anticipation that the income will increase. Thus, in the case last referred to (c), Lord Medwyn said, "I have no conception that if the trustees, on their own responsibility, borrow money, or lay out a large sum on repairs in any year, they will be bound to make the whole a deduction from the receipts of that year, so far diminishing the payments to the objects of the charity, or that they may not pay off such sums by instalments in subsequent years." The principle is, that the charity being perpetual, the *commodum* and *incommodum* should be distributed, and neither should fall wholly to the lot of one set of beneficiaries. Again, Sir Thomas Burnett having in 1648 mortified certain lands, the rents of which were to be applied in educating and entertaining three bursars in King's College, Aberdeen, and a question having arisen long afterwards (d) as to the application of the rents, which had greatly increased, Lord Mackenzie observed (e),—"I do not say, if the College, as managers, had put in their minutes, that—whereas we find that the rents at present are not adequate to afford any reasonable allowance to these bursars; but whereas we see that feuing has commenced in that neighbourhood, and that the rents are likely to rise to a large sum annually; therefore, we advance or borrow a sum of money towards

Power to
borrow on
security of the
Estate.

(a) 16 & 17 Vict. c. 137; 18 & 19 Vict. c. 124; 23 & 24 Vict. c. 136.

(b) *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 914.

(c) 3 D. 922.

(d) *Burnett v. King's College, Aberdeen*, 23 Feb. 1844, 6 D. 781; reversed, 28 Aug. 1846, 5 Bell, 409.

(e) 6 D. 746.

the maintenance of the existing bursars, reserving to ourselves to pay it off when the rents shall have risen,—I do not know whether, if that had been done, they would not have been entitled to restitution out of the increased produce. I would not say that there might not be an equalization fund, because the rents may not be paid in a particular year.” In another case (*a*), lands were bought with funds mortified for behoof of the poor of Arbroath in all time coming. The trust deed contained no power either to sell or borrow; but in a time of distress the trustees, *qua* such, borrowed L.500. The annual proceeds of the mortified lands were L.200. The Court held that the creditors could not adjudge the lands, but were entitled to be paid out of the rents. Lord Jeffrey said, “At the same time I may add, that I would feel great doubts, if this debt were due to Shylock or any hard usurer, that the trustees of the mortification would escape from personal responsibility. The bank, however, will no doubt give time, and allow these parties to settle according as they get their funds.” It is proper to mention that in a very recent case (*b*), in regard to an ordinary private trust, the whole Court held, that where the trust deed does not by construction or implication empower the trustees to borrow money on the security of the trust estate, it is not competent for the Court, in the exercise of its *nobile officium*, to confer such power on the trustees. In that case it was alleged, that if the power were not granted, the trust estate would be adjudged for debt (calls upon shares of the Western Bank, of which it partly consisted). In England the power of borrowing on the security of the trust estate is regulated by the same statutes which regulate the power of sale (*c*).

Power to feu
may be exer-
cised without
the interposi-
tion of the
Court.

The power of charitable trustees to *feu out* the mortified lands has been long recognised (*d*), and it may be exercised without the authority of the Court (*e*). Where, however, lands were conveyed to trustees under the express condition that they were “never to be sold, but to remain as mortified land for ever,” it was held (*f*) that the trustees could not feu them out. It is doubtful whether this

(*a*) *Arbroath Banking Co. v. Stevenson & Ors.*, 16 June 1847, 9 D. 1228.

(*b*) *Kinloch & Ors.*, petitioners, 7 Dec. 1859, 22 D. 174.

(*c*) *Supra*, p. 441.

(*d*) *Merchant Company v. Heriot's Hospital*, 9 Aug. 1765, M. 5750.

(*e*) *Craigcrook Mortification v. Savers*, 19 June 1794, Bell's Fol. Ca. 49.

(*f*) *Ib.*

judgment would be repeated ; at the same time, Professor More, who notices it, does not suggest that it should be reconsidered (a).

The power of the trustees of educational foundations to *dismiss*, on sufficient grounds and after a fair trial, teachers appointed by them *ad vitam aut culpam*, has been recognised in various cases (b). In the last of these, the law on the point is very fully stated by Lord Justice-Clerk Hope thus (c) :—"A very mistaken notion seems to be entertained of the effect of such a teacher receiving his appointment *ad vitam aut culpam*. It seems to be thought that the effect of such an appointment is to alter the *relation* which subsists between him and those who appoint him and manage the institution ; so that his *conduct* is not to be *judged of by them*, or the *culpa* to be established by their judgment and decision. This is a serious error. They are still his *employers*, and have the general rights and duties of that relation as much as before, with the single exception, that they cannot dismiss him except when serious misconduct or inefficiency shall be established. But the right to inquire, judge, and dismiss him, still remains with them. It is their opinion by which the *culpa* is to be judged of, as the late Lord President said ; and the Court will interfere only where there is irregularity, precipitation, and oppression in the course of the proceedings, and manifest failure to make out any serious case on the merits. And, above all, the power to inquire into all matters or rumours affecting the teacher's character and usefulness remains with them, unaffected by the tenure of his situation." That being so, a teacher holding such an appointment is bound to attend the trustees or directors from whom he holds his office, when they summon him, and to afford them all reasonable explanations as to his conduct when impugned. If he refuses to attend or give explanations, he may be dismissed at once (d). In that case, the trustees are not bound to investigate the matters of complaint further : "the inquiry before them is not for conviction ; it is to enable them to decide whether they should retain or dismiss" (e). We shall have to consider hereafter the Court's power to review the trustees' decisions.

Administration
of Trusts for
Educational
Purposes.

(a) More's Notes on Stair, p. 856 ; *A. B. v. C. D.*, 29 June 1844, 6 D. 1238.

(b) *A. B. v. Ayr Academy*, 3 June 1825, 4 S. 63 ; (c) 6 D. 1243.

Murray v. Directors of Dundee Academy, 2 July 1833, 11 S. D. 1243. (e) *Ib.*

Resignation.

Difficulties have always existed as to the power of trustees to *resign* their office ; but these have now been removed by the recent statute (a), which confers it on all gratuitous trustees (b).

Trustees may act by a Majority or Quorum.

As in all other cases, unless there is anything in the trust deed to prevent it, a majority of the trustees are always entitled to do all acts connected with the trust management (c). Where a quorum is provided for, the provision must be attended to. In an old case (d), however, it was held, that although the quorum of administrators of a mortification was fixed at two, yet where there was only one survivor he was entitled to act; and that when he died, the patrons, or their heirs and assignees, failing them, the King, as *ultimus heres*, might name new administrators. "Yet," observes the reporter, Fountainhall (e), "our Acts of Parliament name the bishops of the diocese and the Chancellor of the kingdom to have the oversight and management of hospitals, in case the foundation be not kept." In a later case (f), where the right of examining and presenting candidates for a bursary was given to the holders of three public offices, one of these being vacant, it was held that the holders of the other two might act and present.

SECTION III.**LIABILITIES OF THE TRUSTEES, AND REMEDIES FOR THEIR BREACH OF TRUST.****Proceedings *ultra vires* of the Trust bind the Trustee, but not the Estate.**

The acts of the trustees may be such as to bind the trust, or they may only bind themselves. Generally, all acts done and obligations undertaken by them within the powers conferred by the trust deed, will bind the trust estate. On the other hand, acts done by them *ultra vires* will not bind the trust, but may bind themselves. Thus, the minister of a parish, who was *ex officio* one of the trustees under a mortification, raised an action of declarator against his co-trustees for the purpose of obtaining the directions of

Expenses of Litigation ;

- (a) 24 & 25 Vict. cap. 84, § 1. (e) M. 14722.
 (b) *Vide supra*, p. 282. (f) *Campbell v. M'Intyre*, 12 June 1824, 3 S. 126.
 (c) See 24 & 25 Vict. cap. 84, § 1.
 (d) *Hospital of Largo v. Earl of Wemyss*, 15 July 1680, M. 14722.

the Court in regard to the administration of the trust. Having, in consequence of deposition, ceased to be a trustee before the case was ripe for decision, and having died soon after, the action fell asleep, and judgment never was pronounced. The Court were of opinion that the litigation was beneficial to the trust; and accordingly held that the minister's assignees were entitled to claim out of the trust funds the expenses incurred by him as between agent and client (a). The Court expressly found that memorials to counsel were to be included in the expenses allowed; both the Lord Justice-Clerk and Lord Murray laying it down that "trustees are clearly entitled to the expense of consulting counsel" (b). The Justice-Clerk added (c), "The trustees will hereafter carry on the management of the trust at their own hazard, and will have little favour shown them, should the correctness of their distribution of the funds be disputed, when an action has been brought to such a point as they may easily, by sisting themselves, carry it to a conclusion, and so procure the direction of this Court for their guidance and safety." Lord Jeffrey's opinion in the case of *The Arbroath Banking Co. v. Stevenson & Others* (d), quoted above, shows the risks trustees run when their acts are *ultra vires*.

of consulting
Counsel.

When the trust purposes have been violated, and wrong thereby done, no remedy exists against the trust estate. That would appear not to have been the law of Scotland at one time, but it was very authoritatively settled as the law thenceforth in the case of *Ross v. Heriot's Hospital* (e), following upon the case of *Duncan v. Findlater* (f), in regard to road trustees. The action, which was for damages, was rested on the allegation, that through the erroneous acts of the trustees or governors of the Hospital, the pursuer had lost the benefit of the charity, to which he was entitled under a sound construction of the truster's deed. The House of Lords, reversing the judgment of the Court of Session (g), refused to

The Estate
is not respon-
sible for the
tortious Acts
of the Trus-
tees.

(a) *Shepherd & Grant*, compearers in *Gillies v. Hutton's Trustees*, 24 Feb. 1855, 17 D. 516. See Lord Cottenham's speech in *Ross v. Heriot's Hospital*, 5 Bell, 49.

(b) 17 D. 523.

(c) *Ib.*

(d) *Arbroath Banking Co. v. Stevenson & Others*, 9 D. 1233.

(e) *Ross v. Heriot's Hospital*, 19 Mar. 1846, 5 Bell, 37.

(f) *Duncan v. Findlater*, 23 Aug. 1839, M'L. & Rob. 911.

(g) *Ross v. Heriot's Hospital*, 14 Feb. 1843, 5 D. 589.

listen to the statement of the wrong, on the ground that the pursuer had asked redress out of the trust funds, which they held not to be liable to any such demand. Lord Brougham observed, in delivering judgment (a), "The charge against them (the governors of the Hospital), upon which this extraordinary claim for compensation out of the fund of the Hospital is made, is this, that the governors of the said Hospital have illegally and improperly, and in the face of the will and the statutes before referred to, done the act in question; so that it is neither more nor less than this modest charge, that because the trustees have illegally and improperly violated their trust, that is to say, violated the statutes under which they hold their office as trustees, therefore what?—Not that they themselves, the wrongdoers, should pay for having violated the trust, and in the face of the will and statutes done the tortious acts, and committed the injury out of which damage arose to the party complaining: no such thing; but that the fund should be answerable, and that out of that trust fund this compensation should be given for the wrong committed upon Ross by the malfeasance of the trustees. I do not think it is possible to conceive a much more absurd and untenable proposition."

Expense of
opposing Bill
in Parliament.

Where a private bill for regulating the disposal of trust funds had been successfully resisted, the Court held that the expense of the opposition could not be made good against the trust, even assuming the bill to have been a job, and the opposition most proper (b). It may be doubted, whether in this case the Court did not carry the principle established in the case of *Ross, ut supra*, too far. At the time when the claim for the expenses was made, the opponents of the bill had come to be the trustees themselves. They had preserved the funds according to the will of the truster; they had, in fact, acted as trustees in opposing the bill; and it may well be questioned whether they were not entitled to reimbursement out of the trust estate.

Personal
liability of
Trustees for
breach of
Duty.

We are not aware of any action which has yet been directed against charitable trustees personally for injuries arising from their

(a) 5 Bell, 53.

(b) *Trustees of the Mackintosh Fund*
v. *Mackintosh*, 30 June 1852, 14 D.
928. Compare with this, *Milne v.*

Fraser & Ors., 25 Nov. 1859, 22 D.
88; and *Pet. Campbell*, 12 Jan. 1847,
9 D. 397, where expenses were allowed.

breach of duty; but after the decision in the case of *Ross*, and that in regard to statutory trustees in the case of the *Ministers of Edinburgh v. The Magistrates of Edinburgh* (*a*), there can be little doubt that such an action would be sustained if sufficient allegations of breach of trust, and injury thence resulting, were set out on record. Were such an action raised, it would no doubt be made a question how far charitable trustees are entitled to the protection of the recent statute (*b*). We refrain from offering any opinion on this point beyond what we have already indicated (*c*).

The law of England on these points is exactly the same as the law laid down by the House of Lords in the cases we have just been considering; indeed, it was with a scarcely disguised purpose of assimilation that these judgments were pronounced (*d*).

SECTION IV.

JURISDICTION OF THE COURT OF SESSION OVER THE TRUSTEES.

Whether from its inherent rights as the supreme civil tribunal in the land, from its representing the Crown, or because it comes to some extent in the place of the Chancellor of Scotland, the Court of Session unquestionably possesses the right of controlling all charitable trustees in Scotland, and of determining all actions brought against them. "There can be no question," said Lord Cuninghame in the case of *Ross v. Heriot's Hospital* (*e*), "as to the general doctrine, that this Court, as the Supreme Court of Equity in Scotland, has jurisdiction over all charities, in so far as to declare the powers of the administration, to correct all abuses, and to enforce the will of the founder." In another case (*f*) Lord Fullerton observed (*g*), "Where a person locates his trust in a particular country, he must be presumed to have had the law of

Extent of the jurisdiction.

(*a*) *Minrs. of Edinr. v. Mags. of Edinr.*, 28 May 1845, 7 D. 663; affirmed 28 Aug. 1846, 5 Ball, 409.

(*b*) 24 & 25 Vict. cap. 84, § 1.

(*c*) *Supra*, p. 422.

(*d*) See also Grant on Corporations, 118.

(*e*) *Ross v. Heriot's Hosp.*, 5 D. 609.

(*f*) *Ferguson v. Marjoribanks*, 1 Apr. 1853, 15 D. 637.

(*g*) 15 D. 643: See Chapter IX., as to International Questions of Jurisdiction.

that country in view when he executed his trust." Accordingly, although the trust deed was made in Jamaica, it was held that it fell to be interpreted according to Scots law. This is quite in accordance with the English law of jurisdiction, as exhibited in a variety of cases (*a*).

Court will not readily interfere in the way of prevention.

But while the Court's power of control is undoubted, it will not be exercised until after the trustees have, in the first instance, decided upon the matters in dispute; and even after that, the Court will only review the decisions of the trustees where their proceedings have been very irregular, and their conduct amounts to abuse of their powers more or less gross (*b*). The Court has ever expressed an especially strong disinclination to interfere on light grounds with the administration of trustees who have been personally selected by the truster to carry out his charitable intentions (*c*). In the *Milne Bequest* case, the Lord Justice-Clerk Hope said, "Many debateable and doubtful or nice questions may arise, on a great number of private letters, as to the testator's wishes and opinions. On these the trustees are to decide; and I do not think that the testator intended the Court to entertain such questions as to his opinions and wishes, or to review the decisions which the trustees may come to; for to them, and not to the Court, is given the power of collecting his opinions from the letters, and the substitution of a Court of law for that purpose, instead of the trustees, is a very perilous thing indeed" (*d*). The proper form in which to raise any question as to the trustees' mode of administration, is by action of declarator, and not by interdict (*e*). Of course, to prevent their taking a step which would be irrevocable, the latter process may be resorted to in the first instance. When the Court are satisfied that the case is one in which they should interfere for the purpose of regulating the trust management, the course which is usually adopted is to remit to some neutral person to prepare a

(*a*) Per Lord Hardwicke in *Magistrates of Edinr. v. Aubery*, 1 Ambler, 286; per Lord Eldon in *Attorney-General v. Lepine*, 22 June 1818, 2 Swanston, 181; per Lord Gifford in *Emery v. Hill*, 1 Russell, 112.

(*b*) *A. B. v. C. D.*, 29 June 1844, 6 D. 1238; *Graham v. Magistrates of Stirling*, 19 June 1847, 9 D. 1296;

Liddle v. Kirk-Session of Bathgate, *ut supra*, 16 D. 1075.

(*c*) *Milne's Trustees v. Cowie*, 25 Jan. 1853, 15 D. 321.

(*d*) 15 D. 331.

(*e*) *Magistrates of Lanark v. Trustees of Battiesmain's Mortification*, *ut supra*, 14 D. 876.

scheme. When this is lodged, opportunity is given to the trustees and others interested to object to it; but when the objections have been disposed of, and the scheme finally settled and approved of, the trustees must strictly conform their actings to its provisions (a).

In regard to the expenses occasioned by calling for the Court's interference in the administration of a trust, it will depend on the nature of the litigation whether they will be allowed out of the fund or not. If the questions raised are fairly disputable, the Court will allow the expenses of both parties out of the fund, even though the intention of one of them was to set aside the charitable bequest altogether (b). But "unless there be a fair question in the cause," said Lord Gifford (c), the parties raising the action "shall do it at their own expense, and not diminish that fund which the party had destined for charitable purposes." On the other hand, where certain members of an ancient charitable society, including the office-bearers thereof, were illegally endeavouring to dissolve it and divide the funds among themselves, they were found personally liable in the expenses of an action raised to prevent the dissolution (d).

Expenses of
Administration
Suits.

In England, the power of controlling charitable trustees belongs to the Court of Chancery. "By the constitution of the laws of England," says Mr Boyle (e), "the King has an original right, *pro bono publico*, to superintend the care and management of charities; and that right is exercised by the King in his High Court of Chancery, forming, in fact, part of its original jurisdiction." Mr Lewin (f) distinguishes between the *Visitatorial* power of the Crown and the Court's right to control the management of the charity revenue. The distinction rests chiefly on the corporate or public character of English charities, and cannot be said to have any place with us.

English Trusts
subject to the
jurisdiction of
the Court of
Chancery.

(a) *Shepherd & Grant v. Connell & Others*, 24 Feb. 1855, 17 D. 516; *Mags. of Dundee v. Morris*, 8 Feb. 1861, 23 D. 493; *Morison & Others*, petitioners, 25 Jan. 1862. See also *Liddle v. Kirk-Session of Bathgate*, 14 July 1854, 16 D. 1075, in which the Court refused to allow a scheme to be lodged, and the reasons of the refusal,

as stated by the Lord President, p. 1080, and Lord Rutherford, p. 1083.

(b) *Hill v. Burns*, 14 Apr. 1826, 2 W. & S. 80.

(c) 2 W. & S. 92.

(d) *Steedman v. Malcolm*, 23 June 1842, 4 D. 1441.

(e) Boyle on Charities, 12.

(f) Lewin Tr., 365 *et seq.*

SECTION V.

WHO MAY CALL THE TRUSTEES TO ACCOUNT?

Individuals
of the class
beneficially
interested.

Public Corpo-
rations.

Heirs of the
Truster.

Representa-
tives of the
Charity.

Patrons of
Educational
Institutions.

The general doctrine on this point cannot be better expressed than in the words of Lord Cuninghame, in the case of *Ross v. Heriot's Hospital* (a): "It appears equally indisputable that any party possessing an interest, either existing or contingent, in the right administration of the Hospital, has a good title to pursue all actions before this Court necessary for ascertaining and declaring the powers and duties of the Governors, and enforcing their execution." The pursuer in that case was a lad claiming admission into the Hospital as being (in terms of the will of the founder) "a poor fatherless boy, the son of a freeman and burgess of the town of Edinburgh." In an earlier case (b), an action was sustained against the Governors of the same Hospital, at the instance of the Merchant Company and Incorporated Trades of Edinburgh. In the case of *Hill v. Burns*, *ut supra* (c), the right of the relations of the truster, *vi sanguinis*, to sue the trustees, was fully recognised. In *Bow & Others v. The Patrons of Cowan's Hospital* (d), a committee appointed by the Guildry Incorporation of Stirling were found entitled to raise an action calling to account the trustees of a mortification for behoof of "twelve decayed guild brethren" of that town. In this case the Court repelled an objection to the title of the pursuers, on the ground that, supposing the corporation to have a title, it could only sue under its proper *nomen juris* of the Dean and Corporation, and could not transfer its right to a committee; Lord Glenlee observing (e), "A corporation as well as an individual may appoint a commissioner to sue for their behoof, and all that is requisite is sufficient evidence of the commissioner's authority." The Magistrates of Edinburgh, as patrons of the University, were held entitled to raise an action, for the purpose of having the proper

(a) *Ross v. Heriot's Hospital*, 5 D. 609.

(b) *Merchant Co. & Incorp. Trades of Edin. v. Heriot's Hospital*, M. 5750. In the *Morgan* case the claimants were the Magistrates and Town Council of

the burgh in which the bequest was to be executed.

(c) *Hill v. Burns*, 14 Dec. 1824, 3 S. 389, and 2 Wilson & Shaw, 80.

(d) *Bow & Ors. v. Patrons of Cowan's Hosp.*, 6 Dec. 1825, 4 S. 276.

(e) 4 S. 277.

effect given to a trust for the endowment of a Chair of Music within the University (a); and the able-bodied poor of the parish of Bathgate were held *in titulo* to vindicate by action their right to share in the benefits of a bequest to "the poor in the said parish" (b). It is unnecessary to cite other illustrations on this point.

The Poor.

SECTION VI.

ASSUMPTION AND APPOINTMENT OF TRUSTEES (c).

A testator desirous of providing for the perpetuation of the trust management may either name individual trustees, giving them power to assume others; or he may confide the execution of his trust to certain official persons, whether a corporation or not, and their successors in office. In the latter case, as we have seen, the successors in office of the officials first named succeed them in the trust (d). As to whether an *ex officio* trustee can decline to act, it may, on the one hand, be said that no one is entitled to accept an office without undertaking all its burdens; on the other hand, it would be hard to say that a man must refuse a seat on the Bench, or a chair in an university, because it may happen that the occupants of these positions are *ex officio* the managers of a petty but troublesome trust. There is scarcely any authority on the point; but in one case (e), Lord Justice-Clerk Hope expressed an opinion, that the minister of a parish who was *ex officio* a trustee of a mortification for educational purposes was not bound to act. Trustees may safely be advised to act upon this opinion.

Ex officio Trustees.

Where a truster gives his trustees power to assume new trustees, so long as the trustees exercise the power there can be no difficulty in carrying on the trust, and the Court will not interfere; though in one case (f) they did interfere, so far as to confirm the assumed trustees. Where the trust deed gave power to assume trustees "to act *with*" the original trustees, the trust will not lapse on the death

Powers of Assumption.

(a) *Mags. of Edin. v. Professors of the University*, 20 June 1851, 13 D. 1187.

(b) *Liddle v. Kirk-Session of Bathgate*, 14 July 1854, 16 D. 1075.

(c) See Chapter XIV., Sect. 2.

(d) *Macara v. College of Aberdeen*, 1 Feb. 1786, Hailes, 975, & M. 15946.

(e) *Shepherd & Grant v. Connell & Ors.*, 24 Feb. 1855, *ut supra*, 17 D. 520.

(f) *Pet. Morison*, 18 Jan. 1834, 12 S. 307; and 11 Mar. 1834, 12 S. 547.

of the last surviving original trustee, but will be kept up in full force in the person of the assumed trustees (a). In another case (b) Lord Brougham said,—“Though the trustees are only empowered to assume on vacancies, that is quite sufficient for continuing the trust, and would make it their duty to continue it, even if they altogether declined themselves.”

Appointment
of Trustees
and Managers
by the Court.

Principle
stated.

The cases of difficulty, however, are, where the trustor has himself named no trustees; or where he has given no power of assumption; or where the trustees have all failed through death, declination, or any other cause. The question then arises as to the Court's power to nominate trustees. The decisions have not been quite uniform; but the following principles may, we think, be deduced from them with tolerable certainty:—(1) Where the testator has sufficiently constituted the trust, but failed to name trustees at all, the Court will appoint *original* trustees (called managers), and adjust a scheme of administration (c). (2) Where the acceptance of the trustees is, in the mind and by the language of the testator, a necessary condition of the trust's taking effect, if they fail the Court will not supply their place. As Lord Brougham said, in the case of *Black's Trustees v. Miller* (d), “If a trustee dies or refuses the trust, where it is quite clear that the intention of the testator was that, in that event, the heir shall take the estate discharged of any trust, the Court would not be fulfilling the intention of the maker of the deed, but acting contrary to his intention, if it supplied a trustee in that case; that is the very event provided for in which it was to go over, and the trust to cease.” (3) Again, where there are only factorial duties to be discharged, the Court will not name *new* trustees, but will appoint a judicial factor (e). (4) Where, however, a necessity exists for it, as in the case where the duties to be discharged are of a discretionary character, the Court has the power, which it will

(a) *M'Leish's Trs. v. Gibson & Ors.*, 25 May 1841, 3 D. 914.

(b) *Black's Trs. v. Miller & Ors.*, *ut supra*, 2 S. & M'L. 890. Subject to the remarks we have made above, trustees of endowments may now (by 24 & 25 Vict. cap. 84, § 1) assume new trustees, though no power of assumption is given by the trust deed, and

though the original trustees have been reduced to a single survivor. See Chapter XIV. Section I.

(c) *Mags. of Dundee v. Morris & Ors.*, 23 D. 493; *Pet. Morison*, 26 Jan. 1862 (not yet reported).

(d) 2 S. & M'L. 890. See *M'Dowal v. M'Dowal*, 1789, M. 7453.

(e) *Pet. Falconer*, 4 Dec. 1830, 9

exercise, of appointing *new* trustees (a). The doctrine is so laid down by Mr Erskine (b); and the Court have acted upon it when a necessity has arisen for its interference. We shall illustrate these principles by referring to one or two cases in which the Court has nominated original and new trustees for the administration of charitable and corporate institutions.

The first case of which we have obtained an authentic account is that of the Prime Gilt Box of Kirkcaldy, a quasi-corporate institution of the nature of a guildry, the management of which had fallen into abeyance. The defenders having been ordained (c) to convey the property "*in trust to such person or persons as the Court may name, and in such terms and under such conditions as the Court may hereafter direct,*" the process was remitted to the Lord Ordinary "to hear parties further, and make the necessary inquiries, with a view to the adjustment of the rights of parties, in consistency with the nature and purposes of the institution and its altered circumstances." Under this remit, the Lord Ordinary made a remit to Mr Andrew Jameson, advocate (19 July 1842), "to inquire, examine, and report to the Lord Ordinary as to the proper course to be adopted in carrying into effect the findings of the Court, in consistency with the nature and purposes of the institution, and its altered circumstances, and with power to the reporter to take such assistance as he may find necessary." The Court had in the meantime appointed a judicial factor for the temporary management of the affairs of the institution. After full inquiry and investigation, Mr Jameson reported to the Lord Ordinary a proposed new con-

Appointment
of Original
Trustees.

S. 142. See *Grant*, 13 Feb. 1790, M. 7454; *Moir*, 6 July 1826, 4 S. 801; *M'Aslan*, 17 July 1841, 3 D. 1263.

(a) *Campbell v. Campbell*, 26 June 1752, M. 7440; *M'Dowal v. M'Dowal*, *ut supra*; *Moir*, *ut supra*; *Preston's Trs. v. Lady Baird Preston*, 8 Feb. 1838, 16 S. 457; *Trs., etc., of the Prime Gilt Box of Kirkcaldy*, 27 May 1859, 21 D. 871 (see 4 D. 1441); *Morison & Ors.*, 25 Jan. 1862; but see *Dick v. Ferguson*, 22 Jan. 1758, M. 7446; *Marjoribanks*, 27 Feb. 1822, 1 S. 355; *Ferguson v. Marjoribanks*, 1 April 1858, 15 D. 637; *Lindsay*, 9 D. 1297, & 19 Scot. Jur. 433.

(b) Ersk. 3, 9, § 14. The law of England on this matter is, in so far as general principles are concerned, very similar to our own. But the details are so much affected by the peculiarities of the practice of the Court of Chancery, that it would serve no good purpose to refer to them more particularly in this place. The subject is very fully treated by Mr Boyle in his work on Charities, p. 212 *et seq.*

(c) *Steedman v. Malcolm & Ors.*, 23 June 1842, 4 D. 1441. The subsequent proceedings are narrated in a minute in *Pet. Morison*. 26 Jan. 1862.

Kirkcaldy
Case.

stitution and rules for the management of the Prime Gilt Box Society. This constitution suggested, section 1st, that "the whole funds, property, and effects, heritable and moveable, belonging to the Prime Gilt Box Society of Kirkcaldy, shall be made over and conveyed to, and remain vested in, the present Provost and Bailies of the burgh of Kirkcaldy, and their successors in office, *as trustees and fiduciaries* to and for the use and behoof of the members of the Prime Gilt Box, and persons entitled to relief out of the funds thereof, as being the poor of the seafaring population of the burgh of Kirkcaldy." And after defining the persons for whose behoof the funds should be held, the report proposed, section 9, "That the affairs of the trust shall be directed and managed by a body of the *managers*. The Provost and two Bailies of the burgh of Kirkcaldy, and also the Sheriff and Sheriff-substitute of the county of Fife for the time being, shall *ex officio* be managers. The other managers shall be elected as follows." And, section 10, "On the day of _____, after the final interlocutor of the Court, authorizing the rules of the trust, the trustees, of whom two shall be a quorum, shall hold a meeting for commencing the new system of management, and shall call, by advertisement, etc., a meeting of all shipowners, etc., to be held on a day not sooner than eight nor later than twenty-one days thereafter," to elect managers of the "Prime Gilt Box" for the year ensuing.

Judgment of
the Court.

The Lord Ordinary (Lord Wood) approved of the above constitution and rules by the following interlocutor, dated 19 March 1845:—"The Lord Ordinary approves of the report by Mr Jameson, No. 59 of process, and of the proposed constitution and rules of the Prime Gilt Box of Kirkcaldy, contained in said report, with the alterations made by the Lord Ordinary upon the tenth and eighteenth rules: Appoints the same to be the constitution and rules of the said Prime Gilt Box in all time coming; and directs the meeting, mentioned in article tenth, for commencing the new system to be held within the Town-house of Kirkcaldy, on Tuesday, the 8th day of April next, between the hours of twelve and two; and decerns, and allows this interlocutor to go out, and be extracted *ad interim*." By virtue of this appointment of *trustees* and *managers* thus made by the Court, the affairs of the Prime Gilt Box of Kirkcaldy have been and are now being conducted.

A similar course was followed by the Second Division in the process instituted for the administration of the bequest left by John Morgan for the endowment of an hospital in Dundee.

Appointment
of Trustees
for the Morgan
Hospital.

The Court, after applying the judgment of the House of Lords, made a general remit to Professor Swinton, who reported a scheme for their consideration (a). By that scheme—(1) A sum of L.73,500 was proposed to be vested in “the Provost of Dundee, the Sheriff of Forfarshire, one of the Sheriff-substitutes of Forfarshire to be named by the Sheriff, the Dean of Guild of Dundee, and the Governor of the nine incorporated trades of Dundee, all for the time being, *as trustees* for the establishment, endowment, and maintenance in all time coming of an hospital in Dundee, for the education, lodging, boarding, and clothing of a hundred boys, the sons of tradesmen, mechanics, and persons of the working class generally, whose parents stand in need of assistance to enable them to educate their families, or who are orphans in need of assistance. Any three of the said trustees shall be a quorum; and the hospital shall be known and called by the name of the Morgan Hospital.” (2) So much of the sum as should not be required for the erection of the hospital, etc., “shall be invested by the said trustees, under the direction of the governors of the hospital, in good and sufficient heritable securities, or in such other securities as the trustees and governors may, with the sanction of the Court, in either Division thereof, from time to time approve and select; and the annual proceeds of all such investments shall be applied for the purposes of the hospital. (3) All lands, buildings, and other heritages acquired or erected for the purposes of the hospital, shall be vested in the said trustees, who shall be bound to pay the expense of acquiring or erecting the same. And the said trustees shall also be at all times bound, when required by the governors, to execute all necessary deeds and writings in connection with the management of the property vested in them, and, in particular, all mandates and other writings necessary for the receipt by the treasurer of the hospital, to be appointed as hereinafter provided, of the revenues and produce of the said property.” (4) The governors “of the hospital shall be twenty in number,” six being official persons,—the Provost of

Scheme of the
Hospital.

(a) *Magistrates of Dundee v. Morris*, of the bequest are stated, *supra*,
8 Feb. 1861, 23 D. 493. The terms p. 425.

Dundee, etc., and the other fourteen to be elected by the Magistrates of Dundee, and other public bodies connected with the district; the general management of the hospital being vested in the governors. The scheme contains, in its after heads, various directions and rules; in particular, a regulation that "the governors shall nominate and appoint a fit and proper person to be treasurer and clerk to the hospital, to hold office during their pleasure, and shall require the person so nominated and appointed to find security for his intromissions to an extent not exceeding L.1000 sterling, and shall pay him, as remuneration for his services, such an annual sum as they may think proper." There is then embodied in the report a detailed scheme of education, to be placed under the direction of the governors, together with many minute regulations as to the general management and internal polity of the hospital.

Judgment of
the Court.

After a good deal of discussion the Court pronounced, upon 8th February 1861, an interlocutor, whereby they "approve of the amended scheme, No. 82 of process, authenticated of this date as relative hereto; and find and declare that said amended scheme is, and shall be, the scheme for the erection and endowment of the hospital in the town of Dundee to be called in all time coming the Morgan Hospital; and ordain the said scheme to be recorded in the books of Council and Session for preservation" (a).

Appointment of
New Trustees.

The Kirkcaldy and Dundee cases are examples of the appointment of original trustees. The case of *Preston*, noticed in another chapter (b), is a precedent for the appointment of new trustees where the settlor's nomination has fallen by non-acceptance. In a case which is still depending in the First Division, the application was for the appointment of trustees to a school founded by private endowment; the trust having lapsed by the death of all the original trustees. The First Division, after ordering a minute of debate as to the competency of the proceeding, entertained a petition for the appointment of trustees and managers to the school, and remitted to Professor Swinton to prepare a scheme of management to be reported to the Court (c).

(a) 23 D. 495. The Court also appointed a diet for the election of trustees and governors in terms of the above-mentioned scheme.

(b) *Supra*, p. 272.

(c) *Pet. Morison*, 25 Jan. 1862 (not yet reported).

SECTION VII.

RESULTING INTERESTS UNDER TRUSTS FOR CHARITABLE AND
BENEVOLENT PURPOSES.

There are three classes of persons interested in a trust—the beneficiaries properly so called, the trustees, and the heirs of the trustor. We have hitherto been dealing almost exclusively with the interest of the first of these classes; it will be necessary, however, also to refer very shortly to the interests of the other two.

In regard to the *trustees*, the general rule is, that where a bequest is made to them and to their successors in office, such bequest will be held to be in trust, and not beneficial to themselves, unless express words or plain implication show an opposite intention (a). An illustration of the circumstances in which an interest, accordingly, does result in favour of the trustees personally, is furnished by the case of *Burnett v. King's College of Aberdeen* (b). Sir Thomas Burnett, the founder, mortified certain lands in favour of the College, and “provydit thrie burseris of philosophie to be educat, brocht up, and maintenit, every ane of thame for the space of four zeiris, at the said Kingis Colledge of Auld Aberdeen, according to the maner, measour, and qualitie, and as the rest of the burseris of philosophie presentlie in the said Colledge alreddie foundit are educat and enteritenit.” Sir Thomas reserved the patronage of the bursaries to himself and his successors, and declared that if the College should at any time refuse to receive his presentees, the mortified lands should return to him. At the date of the deed, 1648, the rents of the lands were not sufficient for the support and education of the three bursars, but the College supplied the deficiency out of their own funds. In course of time, however, the rents increased so as to leave a large surplus; and the question came to be, whether the College was entitled to retain this surplus for its own purposes, or was obliged to expend the whole upon the bursars. The Court of Session decided against the College. Lords Fullerton and Jeffrey, who concurred in the judgment, both said (c), that a

Whether a
beneficial
interest can
in any case
result to the
Trustees.

(a) *Black's Trustees v. Miller*, 23 *Aberdeen*, 23 Feb. 1844, 6 D. 731; reversed 28 Aug. 1846, 5 Bell, 409.

(b) *Burnett v. King's College of* (c) 6 D. 750 & 752.

Extent of Trustee's resulting Interest defined by Lord Cottenham.

conveyance was not to be presumed to be a beneficial one in favour of the trustees themselves, unless there was a balance left undisposed of by the trust deed; but that, if there were such balance, then any subsequent balance would go to the trustees themselves. They were of opinion, however, that the principle did not apply in the present case, seeing that in 1648 the rents were insufficient to maintain the three bursars. The House of Lords reversed this judgment, and held that, after maintaining the bursars, according to the manner, measure, and quality of the other bursars within it, the College was entitled to retain the surplus. The Lord Chancellor Cottenham said (a), the donee under a trust will get the benefit of any increase of the fund, "1st, if the gift be to the donee, subject to certain payments to others (b); 2d, if the gift be upon condition of making certain payments, subject to forfeiture upon non-performance of the condition (c); or 3d, if the donee might be a loser by the insufficiency of the fund, which, indeed, is consequential upon the last" (d). His Lordship held that all these elements combined in the present case to give the increase in the fund to the trust donee, to wit, the College. In delivering judgment, Lord Cottenham was at great pains to show that there was no adverse

(a) 5 Bell, 481.

(b) *Attorney-General v. Fishmongers' Co.*, 5 My. & Cr. 11, 16; *Attorney-General v. Smythies*, 2 Russ. & My. 717, 2 L. J. Ch. 58. The corporation consisted of one warden and five poor brothers; and it was directed that out of the rents L.2, 12s. should be paid to each poor brother, and that the remainder should be applied to support the warden and poor of the hospital, and for repairs. The value of the property had greatly increased when the information was filed. However, Lord Brougham, Ch., reversing the decision of Sir John Leach, held that no more could be given to the charity than five sums of 52s., and that the warden was entitled to the surplus. "If," said his Lordship, "I give a fund entirely to one body, subject to certain payments to other parties, these can only take what is given as a charge, and the sur-

plus must go to the donee of the fund, unless there be circumstances clearly indicating a contrary intention (2 L. J. Ch. 64).

(c) *Attorney-General v. Cordwainers' Co.*, 3 My & K. 535, decided by Sir John Leach, where property was devised to a corporation to pay certain charitable bequests out of the rents, with a destination over to testator's brother in case the corporation should neglect to perform his will. His Honour observed, "This is a gift upon condition, and not merely a trust; the condition of forfeiture proves the intention to give a benefit; the imposition of a penalty for non-performance of a condition, implies a benefit if the condition be performed."

(d) *Attorney-General v. Corporation of Bristol*, 2 Jac. & W. 320; *Thetford School case*, 8 Co. Rep. 130.

precedent in Scotland; though, from the tone of his remarks, it is very doubtful whether, had he found one, he would have allowed it to stand in the way of his design of reconciling the principles and practice "in the two jurisdictions." In particular, he dealt with the case of the *Perth Hospital* (a), and pointed out that that authority was not against his view, because there truly there was no "limit of the expenditure to be bestowed upon the first object of the gift." So far as the judgment itself went, his Lordship was quite correct; but he does not appear to have remarked that, in the *obiter dicta* of the judges who took part in it, this view very clearly appears, that had there been any reversion, in their opinion it would not have gone to the trust donee of the hospital, but to the heir of the donor or patron. This oversight on the part of Lord Cottenham must deprive his judgment of the full value which otherwise it would have had (b).

Distinction
between a
Trust of the
entire Subject
and a Burden.

There is a very old case (c), in which a testator left 4000 merks to build a bridge over the Blackadder. The executor built one for 1000 merks; but the Court held that he ought to have "waired" the whole sum on the bridge, and therefore, on a sort of *cy-près* principle, ordained him to expend the balance on another bridge. Here, accordingly, though there was actually an undisposed of balance, no interest was held to result in favour of the truster's heir; the true *ratio decidendi*, however, doubtless being that the executor's conduct was a fraud on the trust.

Resulting
Interest of the
Settlor's Heir.

The *heir's* resulting right may either be to the whole estate, or to a surplus. In *Black's Trs. v. Miller*, to which reference has so

(a) *Managers of Perth Hospital v. The Patrons*, 1795, Bell's Fol. Ca. 173.

(b) We may add, that we entertain a strong opinion that the doctrine of a resulting beneficial interest in the trust donee is only maintainable in the following cases;—namely, (1) where the donees are the representatives of a public institution, such as a college or a municipal corporation, and the surplus is sought to be applied not to their individual benefit, but to the general purposes of the institution, as distinguished from the special object of the bequest; and (2) where the donees are either relatives of the

settlor or *personæ predilectæ*, and the disposition is not expressly qualified by words of trust, but may fairly be construed (on the principles explained by Lord Cottenham) as an absolute and beneficial disposition, subject to the burden of the charitable bequest; and (3) where from the antiquity of the endowment it is impossible to ascertain the parties who, as heirs of the settlor, would be entitled to the resulting interest in preference to the trustees.

(c) *Commissioners of Berwickshire v. Craw*, 1678, M. 1351.

Where the Trust is made conditional on the Trustee's acceptance.

often been made, Lord Brougham said (a), "If a trustee dies or refuses the trust, where it is quite clear that the intention of the testator was that, in that event, the heir shall take the estate *discharged of any trust*, the Court would not be fulfilling the intention of the maker of the deed, but acting contrary to his intention, if it supplied a trustee in that case; that is the very event provided for in which it was to go over, and the trust to cease." Again, in *M'Leish's Trs. v. Gibson & Ors.* (b), a testator conveyed his whole property in favour of trustees, the free annual proceeds thereof to be employed "solely for the use of the poor of the Episcopal communion of Scotland." The annual appropriation contemplated by the trust deed amounted to L.350, which was to be divided according to certain rates, specified with great particularity, among 140 poor persons. The Court, while holding that the trust deed excluded the heir-at-law and next of kin for the time, reserved to them any eventual interest which might arise, in case the purposes of the trust should at any time become wholly or partially impracticable. The judges were also of opinion that the truster's directions as to the appropriation of the annual proceeds to a certain number of persons, and at certain rates, were to be taken as demonstrative only, and not as taxative; and therefore that any surplus revenue might be employed in adding to the number of persons, or increasing to a reasonable extent the sums to be paid, or even in forming a reserve fund for supplying deficiencies in future years, or defraying the expenses of necessary repairs, but "without prejudice, nevertheless, to any question which might arise by the possible emergence of any great excess of the funds beyond what can fairly be required, under the most liberal construction, for fully satisfying all the declared objects of the trust." In giving his opinion, Lord Moncreiff said (c):—"Within moderate bounds, there may be a discretion to increase the sums, or to reserve the surplus for repairs and future deficiencies; but if it came to an excess, as if there were no claims, or so few as to make the shares far beyond the fair object, or the reserved funds were to be beyond any fair necessity, I should have great doubt whether the heirs-at-law would not have an interest."

Where the purposes do not exhaust the Estate.

(a) *Black's Trs. v. Miller*, 2 S. & M'L. 890. See *Managers of Perth Hospital v. The Patrons*, *supra*.

(b) *M'Leish's Trs. v. Gibson & Ors.*, 25 May 1841, 3 D. 914.
(c) 3 D. 926.

In the *Morgan* case, where the subject of the bequest was a moveable fund, a clear opinion was intimated by the law lords, to the effect that the surplus estate, after a fair and liberal provision had been made for the objects of the charity, belonged to the truster's next of kin (*a*). In accordance with these opinions, and no opposition having been offered, the Court of Session, after providing for the building and endowment of an hospital at a cost of L.73,500 (*b*), preferred the next of kin to the balance of the fund in medio.

Resulting Interest where the amount of the Bequest is not specified.

There can be no doubt, of course, that if the settlement fails altogether, either in consequence of vagueness, or because the object is unattainable, the estate will result to the heir-at-law as intestacy (*c*).

Lapse.

The fair import of the decisions would therefore seem to be:—

Import of the Authorities.

1. Where there is a conveyance to trustees on the condition of their making certain payments to the beneficiaries, and the proceeds of the trust estate increase beyond the amount of these payments, the surplus will go to the trustees themselves (*d*). Wherever, in fact, there is a bargain or agreement—for so Lord Cottenham put in the case of the Burnett bursaries (*e*)—between the truster and the

(*a*) *Mag. of Dundee v. Morris*. See Lord Wensleydale's opinion, 3 M'Q. 175, and the judgment of the House, which declared that the will was a bequest of *so much* of the personal estate as was necessary to provide an hospital for 100 boys. In this case, as there was no testamentary appointment of trustees, no doubt could arise as to *who* was entitled to the surplus.

(*b*) 8 Feb. 1861, 23 D. 493.

(*c*) *Mason v. Skinner*, 6 Mar. 1844, 16 Jur. 422. To this principle we may refer Lord Jarviswoode's recent decision in the case of *Duff's Trs. v. The Lord Mayor of London & Ors.* The legacy was in the following terms: "I bequeath to the Societies of Scripture Readers in the following towns (9 towns named) the interest of my Peninsular East India Railway funds, to be *equally* annually divided amongst them." Claims having been lodged

for four societies, the Lord Ordinary found each of them entitled only to a one-ninth share of the specific legacy, and preferred the residuary legatees for the balance. The judgment was rested on the ground, that as the money was left to these societies in *equal shares*, there was no room for the operation of the *jus accrescendi*. Had the wording of the bequest been different, a question of novelty would have arisen, namely, whether, in the case of a joint bequest to several parties, some of whom are *imaginary*, the real legatees can claim the shares of the imaginary legatees, for the same reason that they would be entitled to claim the shares of real legatees whose existence had terminated before the death of the testator? (Judgment final, 18 Mar. 1862, 24 D. 557.)

(*d*) But see note, p. 459, *supra*.

(*e*) 5 Bell, 431.

trustees, by which, in one event, the trustees may suffer loss, if the value of the trust estate increases, they, on the other hand, receive the benefit of the increase.

2. Where the truster appoints trustees, and, without entering into any agreement with them, simply directs certain payments to be made by them, if there comes to be a considerable surplus, it will go to the heirs-at-law of the truster.

3. If the trust purposes become impracticable, wholly or partially, a trust will result in favour of the truster's heirs-at-law.

Doctrine of the
Law of Eng-
land.

In England, the leading case on this subject is Lord Eldon's celebrated judgment in *The Attorney-General v. The Mayor of Bristol* (a). Mr Lewin summarises the results of that decision, as well as those preceding and following it, with admirable clearness, thus (b):—"It may be noticed that settlements to charitable purposes are an exception from the law of resulting trusts; for upon the construction of instruments of this kind, the Court has adopted the following rules:—1. Where a person makes a valid gift, whether by deed or will, and expresses a general intention of charity, but either particularizes no objects (c), or such as do not exhaust the proceeds (d), the Court will not suffer the property in the first case, or the surplus in the second, to result to the settlor or his representatives, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied. 2. Where a person settles lands, or the rents and profits of lands, to purposes which at the time exhaust the whole proceeds, but, in consequence of an increase in the value of the estate, an excess of income subsequently arises, the Court will order the surplus, instead of resulting, to be applied in the same or a similar manner with the original amount (e). 3. But even in the case of charity,

(a) *Attorney-Gen. v. Mayor of Bristol*, 2 Jacob & Walker, 294.

(b) Lewin, 124.

(c) *Attorney-General v. Herrick*, Amb. 712.

(d) *Attorney-General v. Haberdashers' Company*, 4 B. C. C. 102, and 2 Ves. jun. 1; *Attorney-General v. Minshull*, 4 Ves. 11; *Attorney-General v. Arnold*, Shower's P. C. 22; and see *Attorney-General v. Sparks*, Amb. 201;

and Lord Eldon's observations in *Attorney-General v. Mayor of Bristol*, 2 Jac. & W. 319.

(e) *Inhabitants of Eltham v. Warreyn*, Duke, 67; *Sutton Colefield case*, second resolution, id. 68; *Hynshaw v. Morpeth Corporation*, id. 69; *Thetford School case*, 8 Coke, 130 b. (Vol. IV. 401); *Attorney-General v. Johnson*, Amb. 190; *Kensington Hasting's case*, Duke, 71; *Attorney-General v. Mayor*

if the settlor do not give the land, or the whole rents of the land, but, noticing the property to be of a certain value, appropriate part only to the charity, the residue will then, according to the circumstances of the case, either result to the heir-at-law (*a*), or belong to the donee of the property subject to the charge, if the latter be (as in the case of a charitable corporation) itself an object of charity" (*b*). Mr Lewin then goes on to observe that the law was settled at a time when the doctrine of resulting trusts was imperfectly understood, and that there is little doubt, were the subject still open, the Court would in the general case hold a trust to result (*c*).

SECTION VIII.

QUESTIONS AS TO CHURCH PROPERTY.

We have thought it best to treat of these cases of disputes in regard to the property of churches, when the congregations worshipping in them have become divided, in a separate section, because, while they undoubtedly come with perfect propriety under the general head of Private Trusts in Perpetuity, it is not easy to class them under any of the subdivisions of that subject which we have already considered. The decisions are not very numerous, but they exhibit a considerable amount of fluctuation of opinion in the Court

of *Coventry*, 2 Vern. 397, reversed in H. of L., 7 B. P. C. 236 (see the foregoing cases commented upon by Lord Eldon in *Attorney-General v. Mayor of Bristol*, 2 J. & W. 316); *Attorney-General v. Coopers' Company*, 19 Ves. 189, per Lord Eldon; *Attorney-General v. Wilson*, 8 M. & K. 362; *Lord v. London City*, Mos. 99; *Attorney-General v. Master of Catharine Hall, Cambridge*, Jac. 381; *Attorney-General v. Beverley*, 6 H. L. Cases, 310; *Attorney-General v. Drapers' Co.*, 2 Beav. 508. 4 Beav. 67; *Attorney-General v. Christ's Hospital*, ib. 73; *Attorney-General v. Merchants Venturers' Society*, 5 Beav. 338; *Attorney-General v. Corporation of South Molton*, 14

Beav. 357; *Attorney-General v. Caius College*, 2 Keen, 150; and see *Attorney-General v. Smythies*, 2 R. & M. 717; *Attorney-General v. Drapers' Co.*, 6 Beav. 382.

(*a*) See *Attorney-General v. Mayor of Bristol*, 2 J. & W. 308.

(*b*) *Attorney-General v. Beverley*, 6 H. L. Cases, 310; *Attorney-General v. South Molton*, 5 H. L. Cases, 1; *Attorney-General v. Trinity College*, 24 Beav. 383; *Attorney-General v. Dean of Windsor*, 24 Beav. 679; affirmed in H. of L., 6 Jur. N. S. 833.

(*c*) See Lord Brougham's observations in *Attorney-General v. Smythies*, noticed *supra*, 2 L. J. Ch. 58.

as to the principles which should guide it in ascertaining the rights of the contending parties. These principles are now, however, settled, and are in themselves simple enough; though their application to particular cases involves the Court in probably the most difficult and perplexing investigations which ever devolve upon it.

Deed of Investiture may provide for the event of a Schism.

It may be premised, that where the titles to the church expressly provide that it shall be held by the trustees for behoof of the general governing body of the particular sect, or where they expressly provide for the case of schism by declaring, for instance, that in such an event the property shall belong to the majority of the congregation, there can be but little difficulty as to the rights of parties should a schism take place. The situation of matters with which we are now about to deal, is where, by the titles, the property is held as a trust for the congregation and its members, without any provision for the case of a schism.

Congregation has a title to sue.

In the earliest reported case, commonly known as *Gibb's* case (a), where a Secession congregation split among themselves, and the new trustees elected by the majority sued the existing trustees, who adhered to the minority, to denude in their favour, the Court, altering the judgment of Lord Elchies, refused to sustain the action, on the ground that the pursuer's "constituents were no legal congregation." The Court, however, soon adopted more tolerant notions, and there is no other case in which the title of a Dissenting congregation to sue or be sued has been disputed.

At one time the Court would only recognise the Majority.

At first, when these questions came before the Court, the principle on which they solved them was by asking which party was in the majority; they then found that party entitled to the trust property, without any regard being paid to the consideration, whether they adhered to the original opinions of the congregation, or to those of the sect with which it was connected (b).

Property afterwards given to those who adhered to the Ecclesiastical Superiors.

In 1803 occurred the case of *Craigdallie*, arising out of the dissensions among the Burgher Seceders. Davidson, Craigdallie, and other members of the congregation of the Associate Synod in Perth, sided with the minority of the Synod; but in respect they composed

(a) *Bryson v. Wilson & Bain*, 1751, Elchies, *voce* Title to Pursue, No. 1.

(b) *Wilson v. Jobson*, 18 Dec. 1771, M. 14555; *Allan v. M'Crae*, 25 May 1791, M. 14583, and Bell's Octavo

Cases, 538; *Dunn v. Bruntom*, 18 May, 1801, M. "Society," No. 3 (and cases of *Auchincloss v. Black*, 7 Mar. 1791; and *Smith v. Kyd*, 26 May 1797, there noticed).

of the Perth congregation, they claimed possession of the chapel, because they had remained faithful to the principles and communion of the founders. The larger party at first left the chapel; but very soon presented a petition to the Sheriff, praying him to reinstate them in it. The Sheriff directed that the one party should have access to the church in the forenoon and the other in the afternoon, and that they should not disturb each other in their devotions. The question, however, was soon raised before the Court of Session, each party bringing an action against the other to have him turned out. When the case was first debated, the Court held (a), in conformity with former judgments, that where there is a schism, the property belongs to the majority in point of interest. Aikman's party having reclaimed, the Court altered their judgment, and held (b) that in such circumstances the property belongs to those who adhere to the ecclesiastical superior or community as at the date of the creation of the trust. To this second interlocutor their Lordships finally, though with difficulty, adhered (c).

The case was then appealed to the House of Lords, who remitted it for further argument. In moving the remit, Lord Chancellor Eldon said (d), "It was true the Court could not take notice of religious opinions with a view to decide whether they were right or wrong, but it might notice them as facts pointing out the ownership of property. With respect to the doctrine of the English law on the subject, if property was given in trust for A. B. C., etc., forming a congregation for religious worship, if the instrument provided for the case of a schism, then the Court would act upon it; but if there was no such provision in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestui que trusts*, for adhering to the opinions and principles in which the congregation had originally united. He found no case which authorized him to say that the Court would enforce such a trust, not for those who adhered to the

True principle laid down by Lord Eldon.

Minority adhering to the original principles may oust the governing body or Majority deviating from

(a) *Davidson & Others v. Aikman & Others*, 16 Nov. 1803, M. 14592.
(b) 1 Nov. 1804, M. 14593.

(c) 27 Nov. 1805, M. 14584.
(d) 1 Dow, 16.

those principles.

original principles of the society, but merely with a reference to the majority; and much less, if those who changed their opinions, instead of being a majority, did not form one in ten of those who had originally contributed; which was the principle here. He had met with no case that would enable him to say that the adherents to the original opinions should, under such circumstances, for that adherence forfeit their rights." The case accordingly went back to the Court of Session, who found that they could not discover that the defenders, Aikman and others, had deviated from the original principles of the congregation, and therefore sustained their right to the chapel, whilst they debarred from using it the pursuers, who held the same views. In their interlocutor, they (a) "find that the pursuers, James Craigdallie and others, have failed to condescend upon any acts done or opinions professed by the Associate Synod, or by the defenders, Jedediah Aikman and others, from which this Court, so far as they are capable of understanding the subject, can infer, much less find, that the said defenders have deviated from the original principles and standards of the Associate Presbytery and Synod." This was affirmed by Lord Eldon in a very characteristic judgment, in which, speaking of the judgment appealed from, he says (b), "The Court pronounced an interlocutor, in which it describes the utter impossibility of seeing anything like what was intelligible in the proceeding; and I do not know how this House is to relieve the parties from the consequence. The Court of Session in Scotland were full as likely to know what were the principles and standards of the Associate Presbytery and Synod of Scotland as any of your Lordships; and are as well, if not better than your Lordships, able to decide whether any acts done or opinions professed by the defenders, Jedediah Aikman and others, were opinions and facts which were a deviation on the part of the defenders from the principles and standards of the Associate Presbytery and Synod. If they were obliged to qualify the finding, as they do, intimating that they doubt whether they understood the subject at all, under the words, 'as far as they are capable of understanding the subject,' I hope I may be permitted, without offence to you, to say that there may be some doubt whether we understand the subject, not only because the Court of Session was much more likely to understand

(a) 2 Bligh, 537.

(b) 2 Bligh, 542.

the matter than we are, but because I have had the mortification, I know not how many times over, to endeavour myself to understand what these principles were, and whether they have or have not deviated from them, and I have made the attempt to understand it; but I find it, at least on my part, to be quite hopeless. . . . All I can say upon the subject is, that after racking my mind again and again upon the subject, I really do not know what to make of it."

At the close of his speech, Lord Eldon expressed a further doubt as to whether it was necessary or proper to debar the *Craigdallie* party from the use of the chapel; in fact, whether the original judgment of the Sheriff was not the right one after all; and he took time to consider what he should do. But ultimately he proposed a simple affirmance of the interlocutor of the Court of Session in all its parts (a).

In the interval between the first decision of the Court of Session and the ultimate judgment of the House of Lords in *Craigdallie's* case, occurred the cases of *Bulloch* (b), and *M'Intyre v. M'Crie* (c); but of course it is unnecessary to consider them. In 1823 the case of *Craig v. Mackersy* (d) was decided; but the judgment went entirely on the special terms of the lease, and so does not affect the general doctrine as laid down by Lord Eldon, which was expressly recognised in *Galbraith v. Smith* (e), *Craigie v. Marshall* (f), and *Couper v. Burn* (g). It has, however, been held, that if all parties agree or fail *tempestivé* to object to the church being occupied by a portion of the congregation who have departed from its original principles, subsequent dissent to the effect of carrying off the buildings will be precluded; for, said Lord Campbell, in moving the affirmance of the judgment of the Court of Session in *Cairncross v. Meek* (h), "First, the maxim will apply, '*Volenti non fit injuria*;' and secondly, the doctrine, that if a man, either by words or by conduct, has intimated that he consents to such proceedings, and that he will

Cases subsequent to *Craigdallie v. Aikman*.

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| (a) 2 Bligh, 544. | (e) <i>Galbraith v. Smith</i> , 10 Mar. 1837, 15 S. 808. |
| (b) <i>Bulloch v. Smith</i> , 31 Jan. 1809, F. C. | (f) <i>Craigie v. Marshall</i> , 25 Jan. 1850, 12 D. 523. |
| (c) <i>M'Intyre v. M'Crie</i> , 24 Feb. 1809, F. C. | (g) <i>Couper v. Burn</i> , 2 Dec. 1859, 22 D. 120. |
| (d) <i>Craig v. Mackersy</i> , 18 Feb. 1823, 2 S. 224. | (h) <i>Cairncross v. Meek</i> , 28 May 1858, 20 D. 995. |

offer no opposition, although it could not have been lawfully done without his consent, yet he cannot afterwards question their legality to the prejudice of those who have relied on the fair inference to be drawn from his conduct" (a).

Law of Eng-
land.

In England, it is unnecessary to say that the law on this point is precisely the same as that stated above. In the leading case (b), Lord Eldon said, "I take it to be now settled by a case in the House of Lords, on appeal from Scotland, that the chapel must remain devoted to the doctrine originally agreed on."

The numerous disputes and expensive litigation as to the right of property in chapels, which have been mainly caused by the loose manner in which the trusts have been framed, suggest to the practitioner the duty of providing, as far as possible, against all such questions, by clearly defining the conditions of the trusts to which the property is subject. Examples of settlements of chapel property will be found in the Appendix.

(a) *Cairncross v. Lorimer*, 9 Aug. 1860, 3 M'Q. 827, see 829.

(b) *Foley v. Wontner*, 2 Jac. & Walker, 247.

CHAPTER XXI.

OF THE POWERS OF TRUSTEES.

SECTION I.

HOW SUCH POWERS ARE CONSTITUTED.

IN the present chapter we have to deal only with powers of an executory or administrative character; that is, powers which do not *per se* imply a special trust in the donee, but which are necessary or incident to the fulfilment of duties of a more general and comprehensive character. In one sense, every duty performed by a party charged with the custody and care of property, may be regarded as the exercise of a power; but in practice the term is restricted to functions connected with the acquisition or transfer of property, and which are of a potential character, such as powers of selling, investing, borrowing, leasing, and the like.

Powers Exe-
cutory and
Discretionary
distinguished.

The powers of trustees are either such as are inherent in the office (termed *Usual* or Ordinary Powers); or such as are created by grant (termed *Special Powers*). The latter are either express or implied,—as where a mandate is given to execute a particular purpose, in which case the powers essential to its fulfilment are implicitly given (*a*). And although a power of sale must in the general case be conferred by grant, yet, as the payment of debts is always the first purpose of a trust, it seems that a power of sale for this purpose is implied in the trust (*b*).

Usual and
Special Powers
distinguished.

Usual Powers are such as must be exercised by the trustee in order to the conservation of the property, or for securing to the

Usual Powers
defined.

(a) Bell's Pr. § 1998.

(b) Bell's Pr. § 1998; *Erskine v. Wemyss*, 13 Mar. 1829, 7 S. 594.

beneficiary the profit and advantage accruing from the present possession of it. Although sometimes made the subject of special grant, they are inherent in the office of the trustee; being, in fact, implied in the general words of conveyance by which a trust is constituted in his person. For this reason, usual powers are never specially conferred in judicial appointments to offices of trust; but, practically, there is no difficulty in determining the extent of the powers with which such officers are clothed *virtute officii*, because it is always competent to the party to present an application for special authority.

Source of Special Powers.

Special Powers are, to some extent, discretionary in their nature; but differ from those discretionary powers treated of in the next chapter (a), in that their exercise does not tend to alter or limit in any degree the beneficial interest in the trust estate, but is solely concerned with the administration of the property. Extraordinary powers are constituted by grant from the party from whom the trustee derives his appointment. Where a trust is vested in an officer of Court, as a factor, curator, or tutor-dative, and it is necessary for the proper administration of the estate that he should be clothed with special powers, he must present an application to the Court from which his appointment flowed,—that is, either to the Junior Lord Ordinary, as representing the Court of Session, or, in the case of tutors, to one of the Divisions of the Court of Session sitting as the Court of Exchequer in Scotland. Trustees holding office under a private appointment, derive their powers from the maker of the settlement.

How far Court may exercise Special Powers under Trusts.

It is true an opinion has been prevalent for some time, that the Court of Session could, in the exercise of its *nobile officium*, grant extraordinary powers to trustees where a case of urgent necessity was shown. There is not wanting a certain amount of authority to lend countenance to that opinion. We do not rely much upon the cases in which the Court has allowed absent or invalid trustees to resign in default of a power of resignation; for this, after all, is only a particular mode of granting exoneration to trustees who have *de facto* become incapable of discharging the duties of their office. Again, the Court has the power of appointing trustees, although, with a view to the enforcement of responsibility,

(a) Chap. XXII. Of Powers of Disposal, Appointment, and Division.

the judges have for a considerable time past been in use to appoint judicial factors; the power of nominating trustees being left in abeyance, or only exerted occasionally for the purpose of giving a constitution to charities, etc., as in the *Morgan* case (a). The Court, however, may lawfully proceed to the appointment of trustees with ordinary powers; or it may itself assume the trust, and exercise both ordinary and extraordinary powers by the hand of its factors. It could not, therefore, have been regarded as a violation of principle, had the Court seen fit to undertake the responsibility of granting extraordinary powers to trustees. However, in the absence of any direct precedent, it was thought safer not to extend its equitable jurisdiction. The cases where extraordinary powers had been conferred on tutors-dative, or at law, were thought not to be in point; because those functionaries are subject to judicial control. But tutors-nominate, who are trustees in every sense, have occasionally been assisted by the Court, not without hesitation. For example, in the case of *Bellamy* (b), the First Division, after considering a report in which all the precedents were brought under the notice of the Court, granted authority to tutors-nominate to borrow money on the security of the trust estate; and soon after, the same Division acceded without difficulty to an application by a tutor-nominate for authority to sell heritage for the purpose of paying off heritable debts (c). Again, in the petition of *Morrison's Tutors* (d), tutors-nominate were empowered by the same Division to let a farm on a nineteen years' lease. This time, an objection was taken by Lord Deas to the course of procedure, on the ground that tutors-nominate do not find caution for their administration; and the Court appears to have yielded with reluctance to the authority of the precedents cited. None of the cases here mentioned, it will be observed, were applications under the Pupils Protection Act.

Court may confer special powers on tutors.

Ultimately the question was referred to the whole Court in the case of *Kinloch* (e). The opinion of the thirteen judges was re-

The Court cannot confer Powers on Trustees;

(a) See *Mags. of Dundee v. Morris*, 8 Feb. 1861, 23 D. 493.

(d) Pet. *Morrison's Tutors*, 20 Feb. 1857, 19 D. 493.

(b) Pet. *Bellamy & Ors.*, 30 Nov. 1834, 17 D. 115.

(e) Pet. *Kinloch & Ors.*, 7 Dec. 1859, 22 D. 174.

(c) Pet. *Mackenzie*, 27 Jan. 1855, 17 D. 314.

questioned in answer to the question—"On the assumption that the trust deed does not by construction or implication empower the trustees to borrow money on the security of the trust estate, Whether it is competent for the Court, by the exercise of its *nobile officium*, to confer on the trustees power to borrow money on the security of the trust estate?" The judges were unanimous in answering this question in the negative, while at the same time they reserved to the petitioner the power of bringing action in competent form, for the purpose of ascertaining whether the deed did confer such power by construction or implication.

but may exercise them through the medium of a Factor.

It must therefore be considered a settled point, that the Court of Session has not the capacity to supplement the powers of trustees; a decision not to be greatly regretted in the existing state of the law, which renders impracticable any effective supervision of trusts by the Court of Session. The remedy for all defects in the administrative machinery of trusts is, of course, by application to the Court for the appointment of a judicial factor under the regulations of the Act of Sederunt.

SECTION II.

OF THE POWERS INHERENT IN THE OFFICE OF TRUSTEE.

Extent of Usual Powers not precisely defined.

Under this head, we intend to give an account of the various powers that have been considered to be inherent in the office of trustee. As we observed in the outset, the powers of judicial factors and managers stand on precisely the same footing as those of trusts (*a*). It is not always easy to draw the line with precision betwixt ordinary and extraordinary powers. To avoid questions, the conveyancer should include in the enabling clause of the settlement all powers of doubtful implication, and which appear necessary for the attainment of the objects of the trust.

The execution of ordinary powers is intimately connected with the administration of trust estates, and the fulfilment of trust purposes; a subject which has been already discussed in the chapters upon the duties of trustees. It will be sufficient in this place to

(*a*) See as to discretionary powers, *Nisbet v. Tod*, 15 Jan. 1848, 10 D. 361.

distinguish the different species of powers of administration, and to define their limits.

The fulfilment of the truster's obligations is usually one of the first purposes of a private trust. Independently of any special direction, there can be no doubt that every trustee has the power of defraying out of the trust estate all debts and charges which can be made to affect it, agreeably to the maxim, that a trustee may voluntarily do everything that he might be compelled to do by action (a). Where the estate appears to be sufficient, he may lawfully pay *primo venienti*; and if he does so, acting in good faith, he will be protected, although the estate should ultimately prove insufficient (b). This rule will not of course apply to trusts created expressly for behoof of creditors. Trustees, like executors, are not bound to pay except on decree; and where there is reasonable doubt as to the existence of the debt, or the sufficiency of the funds, it will be their duty to decline to pay except under judicial authority, leaving the debtor to constitute his claim, or raise an action for the distribution of the estate. Among the debts which a trustee is bound to pay, we may include the burden of alimentering the settlor's family, which devolves upon the trustees as his legal representatives (c). The Court have even granted authority to trustees to make payments out of capital for this purpose (d).

Payment of Debts.

For the management of a trust estate of any considerable extent, it will be necessary to retain a certain sum in bank, and to operate upon the account for the purpose of obtaining temporary credit, etc. The granting of bills will in many cases be a necessary act of administration; and in the course of winding up a business, or completing arrangements for the improvement of property, it may be requisite to enter into contracts with third parties. The miscellaneous class of duties which we have here indicated, and which vary with the nature of the trust purposes, may be executed competently and with propriety by trustees armed merely with the

Management of Property.

(a) Lewin, Tr., 4th Ed. 381.

(b) Bell's Com. 848, 5th Ed. I. 38; Ranken v. Gardner, 1741, M. 16201; Alison v. E. of Dundonald's Trs., 1798, M. 16211; Pagan v. Eaton, 17 June 1823, 2 S. 117.

(c) Riddell v. Riddell, 6 Mar. 1802,

M. "Aliment," No. 2; M'Ewen v. M'Ewen, 10 Feb. 1842, 4 D. 662; Pet. Taylor, 5 Feb. 1850, 11 Mar. 1851, 18 D. 949. But see Section 3, as to the power of making alimentary advances out of capital.

(d) Pet. Taylor, *supra*.

ordinary powers implied in the trust conveyance. Trustees are of course entitled to grant discharges to the debtors of the estate, which will have the effect of binding their constituents ; and on receiving payment, they may grant such abatements or reductions as they may think reasonable. A specific direction—as, for example, a direction to sell lands, to accumulate profits for particular purposes—will imply a power commensurate with the direction (a). And in carrying out the trustor's directions, trustees are entitled to take into consideration letters or memoranda written by the settlor on the subject of the trust (b).

Making up
Titles to
Heritable
Estate.

Trustees of heritable property are empowered, by necessary implication, to make up titles to the estate in their own persons. Under the old forms of conveyancing, this was a matter often attended with considerable difficulty, and gave rise to many questions depending upon the sufficiency of the title, an example of which will be found in the case of *Dunlop v. Crawford* (c). This source of embarrassment has been removed to a considerable extent by the provisions of the Titles to Land Acts, 1858 and 1860. Trustees, as general disponees, may now make up a title by notarial instrument, where they are nominated by the settlor. If they are appointed by the Court, they are judicial managers, and the provisions of the statutes with reference to these officers will apply. Section 38 of the last Act enables the manager to take infeftment by registering the interlocutor granting warrant for completing titles in his person,—the lands to which the title is to be completed being specified in such warrant.

Management
of Heritable
Estate.

The granting of leases for the ordinary term of endurance, being a necessary act of administration, falls within the common law powers of trustees charged with the management of heritable estate. And, on the same principle, trustees infeft in a superiority have power to enter vassals (d). But without a special power, trustees would not be in safety to let the property for any term of unusual duration (e). On this point, the decisions with reference to the powers of factors are instructive. In several recent cases the Court

(a) *Campbell v. Campbell*, 19 Nov. 1852, 15 D. 27 ; and see *Pet. Kinloch*, 17 Dec. 1859, 22 D. 174.

(b) *Milne's Trs. v. Cowie*, 25 Jan. 1853, 15 D. 321.

(c) *Dunlop v. Crawford*, 26 May 1849, 11 D. 1062.

(d) *Ker v. Russell*, 7 Dec. 1838, 1 D. 197.

(e) In *Evans v. Jackson*, 8 Sim.

has authorized judicial factors to grant mineral leases for somewhat extended periods (a). Where express powers of leasing are conferred, the trust deed will of course form the measure of the powers, whether those are exercised by a trustee or a judicial manager (b). A trustee infeft in an entailed estate in trust for payment of debts was held entitled to cut the timber, and interdict at the instance of adjudging creditors was refused (c). Trustees are entitled, without special authority, to complete improvements undertaken by their constituent. And, accordingly, in the case of *Edmond v. Blaikie* (d), the trustees were found entitled to take credit for the expense of certain drainage operations amounting to upwards of L.1100, although the amount was somewhat in excess of the sum contemplated by the truster. But it is not to be supposed that a trustee may at his own hand undertake any extensive system of improvement or melioration, although it will be his duty to lay out such sums as are necessary for ordinary maintenance and repair (e).

The Court have been in the practice of granting authority to trustees for minors to renounce leases, when circumstances rendered such a course necessary or obviously expedient. An example presents itself in the case of *Turner's Trs.* (f), where trustees and tutors nominated by a trust settlement were authorized to renounce leases on the ground that the minor was not possessed of sufficient funds to carry on the farms to advantage.

Renunciation
of Leases.

Trustees under family settlements are usually empowered to appoint factors and agents; and even where there is no express

Appointment
of Factors and
Agents.

217, the Vice-Chancellor of England (Shadwell) held it to be too clear for argument that a trustee for the sale of heritable property was not entitled to grant a lease of it, that being inconsistent with the purpose of immediate distribution. To the same effect is Sir E. Sugden's decision in *Keating v. Keating*, L. & G. 133.

(a) See *Pet. Speirs' Tutors*, 11 July 1848, 10 D. 1474; *Pet. Waddell*, 19 Feb. 1851, 13 D. 739.

(b) *Proctor v. Warden*, 31 Jan. 1824, 2 S. 659.

(c) *Ker v. Graham's Trs.*, 21 Dec. 1827, 6 S. 270.

(d) *Edmond v. Blaikie*, 16 Nov. 1860, 23 D. 21.

(e) In England it is held that a trustee, like a mortgagee, may take credit for sums expended in reasonable improvements and repairs (*Trimlestone v. Hammill*, 1 Ball & B. 385; *Landon v. Hooper*, 6 Beav. 248); but not for ornamental improvements (*Bridge v. Brown*, 2 Y. & C. Ch. Ca. 181); nor for making such extensive alterations as absorb a large proportion of the value, which has been termed "improving the owner out of his estate."

(f) *Pet. Turner's Trs.*, 1 Mar. 1862, Journ. of Jur.

power, yet, as their office is gratuitous, they are entitled at common law to avail themselves of the paid services of professional persons for the discharge of such duties as are not of a discretionary character (a). There can be no doubt that trustees are entitled, at the expense of the trust, to obtain legal advice and assistance in all matters of difficulty and importance. The delegation of ordinary duties of administration, such as the collection of rents, the temporary custody of money, etc., will not, in the general case, render the trustees personally liable for any defalcations of the factor or agent to whom those duties were entrusted, if the appointment were unobjectionable, and there were no marked neglect in calling the party to account (b). Trustees are not entitled without special powers to supersede a factor appointed by the truster (c).

Investment of
Trust Funds.

Trustees have not only the power of changing the securities and investments of the money committed to their care, but it is their duty to do so whenever the existing securities are such as the Court would not approve. This rule applies emphatically to the case where the trust estate consists of money invested in trade. In the two recent cases of *Laird*, and *Cochrane v. Black* (d), trustees were made personally liable for the profits accruing on the investment of trust money in their own business. Trustees are also individually responsible for any loss resulting from such investments, whether personally interested in the business or not (e). Trustees expressly authorized to invest money on personal security are not entitled to lend money to individual beneficiaries beyond the amount of their shares on bills or promissory notes. Personal security means the security of personal property; not of a personal obligation. Unless authorized by special powers, trustees can only invest in heritable securities or the funds (f).

Pursuing
and defending
Actions.

The right of action being a privilege pertaining to every subject, in relation to all matters not expressly withdrawn from the

(a) Bell's Com. 6th Ed. 848; *Sym v. Charles*, 13 May 1830, 8 S. 741; *Hay v. Binny*, 19 Feb. 1861, 23 D. 594.

(b) *Cameron v. Anderson*, 12 Nov. 1844, 7 D. 92; *Thomson v. Campbell*, 16 Feb. 1838, 16 S. 560; *Ainslie v. Cheape*, 6 Feb. 1835, 13 S. 417. See Chapter XXIV. Section 4.

(c) *Fulton v. Macalister*, 15 Feb. 1831, 9 S. 442.

(d) *Laird v. Laird*, 26 June 1855, 17 D. 984; *Cochrane v. Black*, 1 Feb. 1855, 17 D. 321.

(e) *Graham v. Keble*, 10 Nov. 1813, 2 Dow, 17; 21 July 1820, 6 Pat. 616.

(f) *Supra*, Chapter XVI. Sect. 4.

jurisdiction of the Courts, may be exercised by trustees and factors as such (a); and they are of course entitled to retain the expenses of reasonable litigation out of the estate. It is unnecessary to multiply references in support of a doctrine so well established. But we may remark, that even where the validity of the deed of appointment is itself the subject of action, as in the reduction of a settlement *ex capite lecti*, trustees, though unsuccessful, have been held entitled to the expenses of their defence, unless they conduct it in a litigious spirit, and so as to create unreasonable expense (b). In the prosecution of actions, trustees have full power to act upon their own opinion and responsibility; and cannot be compelled by the beneficiary either to carry on proceedings at their own risk, or to lend their names to an action raised or maintained at the instance of the latter (c). And, conversely, a trustee may not only carry on actions to which his constituent was originally a party (d), but may institute actions in the name of the constituent without his consent, and maintain them notwithstanding his disclaimer (e). The trustee's general power of pursuing actions has been held a sufficient title in an application for the constitution of entail improvements (f); but not to pursue a division of commonry (g).

Actions in
name of consti-
tuent.

It is settled that a judicial factor has the power of compromising doubtful claims and actions; and the Court will not, unless where the stake is of great magnitude, either grant special powers for the purpose of enabling him to enter into a compromise, or interfere with his discretion when exercised (h). Prof. Bell was of opinion that trustees have the same power at common law (i). There being no ground for distinction between the powers of factors and

Transactions
and Compromises.

(a) Bell's Pr. § 1998.

(b) *Morrison v. Morrison's Trs.*, 23 Dec. 1848, 11 D. 297; see also *Graham & Others v. Marshall & Ors.*, 22 Nov. 1860, 23 D. 41.

(c) *Duke of Buckingham v. Breadalbane's Trustees*, 17 Jan. 1844, 6 D. 403.

(d) *Mein v. M'Call*, 7 June 1844, 6 D. 1112.

(e) *Carrick v. Hutcheson*, 12 June 1844, 6 D. 1148; *Pitcairn v. Fraser*, 21 June 1834, 12 S. 769.

(f) *Fraser v. Lovat*, 24 June 1852, 14 D. 916.

(g) *Graham's Trustees v. Boswell*, 2 Dec. 1830, 9 S. 121.

(h) See *Anderson*, 29 Jan. 1857, 19 D. 329; *Anderson*, 7 Mar. 1855, 17 D. 596; *Macdougall*, 24 June 1853, 15 D. 776.

(i) Bell, Pr. § 1998; *Mackintosh v. Williamson*, 4 July 1849, 11 D. 1246; *Kennedy v. Kennedy*, 15 Nov. 1843, 6 D. 40. In a subsequent Chapter we have considered the question of authority to collate and elect on behalf of a beneficiary.

trustees, on this matter the authority of Prof. Bell, in conjunction with the cases just cited, may be regarded as conclusive. The general power of compounding, includes of course the particular case of accepting a dividend or composition in bankruptcy (*a*).

Arbitrations
and Refer-
ences.

It is by no means certain that trustees may, without special power, agree to a reference (*b*). The authorities respecting compromises are not analogous. It may be a prudent and judicious act of management to settle a doubtful claim; but the propriety of superseding the action of the regular tribunals by arbitration is not so apparent (*c*). It is clear, however, that trustees are at liberty to carry on proceedings in arbitration which have been instituted by or against their constituents (*d*); for it cannot be their duty to submit to an adverse decision, to the prejudice of the beneficiary. By section 176 of the Bankruptcy Act, 1856, the trustee on a sequestrated estate is empowered to compound and transact or refer to arbitration questions regarding the estate; and the creditors and the bankrupt are bound by the result of such transactions or reference.

Franchise.

In exercising any personal privilege attached to the trust estate, the trustee must act under the instructions of his constituent (*e*). How far this principle applies to voting, has not been expressly determined. Trustees and executors, although unconfirmed, may vote as creditors in the election of a trustee on a sequestrated estate, or at a meeting for considering an offer of composition (*f*). And it would seem they may vote as shareholders in railway companies upon their own responsibility, though this has been questioned (*g*). Trustees are disqualified by the Reform Act from voting in the election of members of Parliament.

Parliamentary
Proceedings.

In the case of *Campbell*, Pet. (*h*), entail trustees were found entitled to the expenses incurred by them in opposing a bill before

(*a*) Bell's Pr. *supra*; *Watson v. Morrison*, 27 June 1848, 10 D. 1414.

(*b*) Ersk. 3, 3, 39; Bell, Arb. 97.

(*c*) See *More's Exrs. v. Malcolm*, 24 Jan. 1835, 13 S. 313; and the opinion of Lord Curriehill in *Ander-son's case*, *supra*.

(*d*) *Barbour v. Wight*, 21 Nov. 1811, F. C.; *Grant v. Girdwood*, 28 June 1820, F. C.; Bell, Arbitr. 97; and see

cases on powers of tutors commented on, *ibid.* 98 *et seq.*

(*e*) See cases noted *antea*, Chapter XII. Section I.

(*f*) *Chalmers' Trs. v. Watson*, 12 May 1860, 22 D. 1060.

(*g*) *Blackburn v. Findlay*, 4 Feb. 1848, 10 D. 590.

(*h*) Pet. *Campbell*, 12 Jan. 1847, 9 D. 397.

Parliament which they believed to be injurious to the estate, on the ground that they were bound to protect the property. But trustees and statutory commissioners are not entitled, at the expense of the estate, to seek an *extension* of their powers from Parliament (a). Accordingly, in the case of *Mackintosh's Trs. v. Mackintosh*, where the magistrates of a burgh who were trustees of a mortification had incurred expenses in promoting a bill for extending the operation of the charity, which was unsuccessful, and their successors in office, disapproving of the bill, agreed to pay the expenses of opposing it out of the trust funds, the Court granted interdict, on the application of the truster's representative, against the intended application of the funds for that purpose (b). So also statutory trustees and railway directors (c) have been interdicted from applying the funds of the shareholders towards payment of the expense of applying to Parliament for extension of their powers (d).

As to powers of Resignation and Assumption, these important privileges having now been conferred by statute (e) upon all trus-

Resignation
and Assump-
tion.

(a) *Pet. Myles*, 13 Dec. 1855, 18 D. 205.

(b) *Mackintosh's Trs. v. Mackintosh*, 30 June 1852, 14 D. 928.

(c) *Brown v. Adam*, 19 Feb. 1848, 10 D. 744.

(d) The same distinction has been taken by the English Courts. Thus, in *Bright v. North*, 2 Phil. 220, 16 L. J. Ch. 255, trustees for the conservation of a river were found entitled to the expense of opposing a bill for a project likely to prove injurious to the banks under their superintendence. Lord Cottenham said that the trustees were entitled to the proper and necessary expense of protecting the property committed to their care; and although there was no direct authority in their Act of Parliament for the application of the funds to the proposed purpose, he thought it was incident to the powers given to the commissioners and the duties imposed on them (16 L. J. Ch. 258). The same principle was affirmed by the Queen's Bench in *Reg. v. Norfolk Comrs. of Sewers*; the criterion being that the proceedings

are necessary and reasonable (15 Q. B. R. 540, 20 L. J. Q. B. 121). On the other hand, the Court of Chancery will grant an injunction to prevent the funds of parliamentary trustees from being applied to the promotion of a bill for additional powers. Of this we have an example in *Attorney-Gen. v. Andrews*, 2 M'N. & G. 225, 19 L. J. Ch. 197, where the late Vice-Chancellor of England was clearly of opinion that the trustees could not claim the benefit of the principle laid down in *Bright v. North*. See on this point, *Vance v. E. Lancashire Ry. Co.*, 3 K. & J. 50; *Att.-Gen. v. Guardians of Southampton*, 17 Sim. 6, 16 L. J. Ch. 393; *Att.-Gen. v. Corp. of Norwich*, 16 Sim. 225; *Stevens v. S. Devon Co.*, 13 Beav. 48, 20 L. J. Ch. 491. The Courts, however, will not restrain trustees or directors from prosecuting a bill before Parliament at their own risk (*Stevens v. S. Devon Ry. Co.*, *supra*; *Anstruther v. East of Fife Ry. Co.*, 19 Apr. 1852, 1 M'Q. 98).

(e) 24 & 25 Vict. cap. 84.

tees under private trusts "unless the contrary be expressed," powers of resignation and assumption may be ranked in the category of Usual Powers. The subject of resignation and assumption of new trustees has been fully discussed in a former chapter (a).

SECTION III.

SPECIAL POWERS CONNECTED WITH THE ADMINISTRATION OF THE ESTATE.

We refer to the introductory section of this chapter for a statement of the limits of the subject, and of the manner in which special powers are constituted.

Personal Property.

As to powers of sale, we have already seen that the power of realizing the personal estate is a necessary, and therefore an implied function of the office of trustee. Were it not so, trustees would be unable to perform the most ordinary duties of the trust, such as payment of debts, or withdrawing the trust money from insecure investments. Nor could they effectually carry out the purposes of distribution contemplated by the testator.

Powers of Sale of Heritable Estate, may be given by implication.

A different rule has long prevailed regarding the right of trustees to dispose of heritable property. Influenced, perhaps, by the fear that ancestral property might be needlessly sold, and partly by a notion now exploded, that such sales might alter the character of the testator's succession, the Courts of law, both in England and Scotland, have from the first viewed with extreme jealousy every assumption by trustees of real estate of powers not specially conferred upon them (b). In the case of trusts, the strict application of the principle that heritage cannot be sold without authority, would have led to absurd consequences, calling for remedial legislation; and the modified doctrine was accordingly received, that a power of sale might be inferred by implication from the nature of the trust purpose, although not granted *per expressum*. Accordingly, in the cases of *Erskine* (c), and *Henderson v. Somerville* (d),

(a) Ch. XIV. (b) Ersk. III. 3, 39.

(d) *Henderson v. Somerville*, 22

(c) *Erskine v. Wemyss*, 13 May June 1841, 3 D. 1049.
1829, 7 S. 594.

it was decided that trustees authorized to sell certain portions only of the settlor's estate, might proceed to sell the remaining property when the produce of the subjects to which the power was applicable proved insufficient for the payment of the trust debts. It is true the authority of these cases was somewhat shaken by the judgment of Lord Brougham in *Allan v. Glasgow's Trustees* (a). Yet, while affecting to doubt the existence of implied powers of sale in the deeds which were the subject of construction in those cases, Lord Brougham did not hesitate to adopt the principle of those decisions, that a power of sale may be inferred from the purposes of the deed. Accordingly, it has since been held, that a trust of heritage for payment of debts implied a power of selling so much of the estate as might be necessary for that purpose (b). Trustees for charitable purposes have been held entitled to dispose of supe-

(a) 1 Sept. 1835, 2 S. & M'L. 350; *Campbell's Trs. v. Campbell*, 4 Dec. 1838, 1 D. 153.

(b) *Graham v. Graham's Trs.*, 21 Dec. 1850, 13 D. 420; and see *Meiklam's Trs. v. Mrs Meiklam's Trs.*, 2 Dec. 1852, 15 D. 159; *Adv.-Gen. v. Smith*, 1 Mar. 1852, Exch. Rep., & 14 D. 585; *Buchanan v. Young*, 13 Mar. 1860, 22 D. 979.

It has never been doubted in England that a testator charging his real estates with payment of his debts, gave thereby an implied authority to the devisee of the estate to sell for payment. But on the question whether an executor, in whom the legal estate was not vested, had the power of selling, considerable diversity of opinion exists. Baron Parke, in the Court of Exchequer, laid down that in such a case the executor could only enforce the power by proceeding against the devisee, if the estate were devised, or against the heir-at-law, if the property devolved upon him by inheritance (*Doe d., Jones v. Hughes*, 6 Exch. 223, 20 L. J. Ex. 148); though he allowed, upon the authority of *Forbes v. Peacock* (12 Sim. 541, 13 L. J. Ch. 46) and the other Chancery cases, that the executor might sell if

clothed by implication with a power. The Lords Justices have since affirmed the power of the executor to sell in all cases where the real estate is charged with payment of debts (*Robinson v. Lowater*, 17 Beav. 592, 23 L. J. Ch. 641; *Wrigley v. Sykes*, 21 Beav. 337, 25 L. J. Ch. 458). But these decisions are disapproved by Lord St Leonards, who says (*Vend. & P.* 13 Ed. 545), that it would not be safe to rely on their authority.

In any use that may be made of those decisions by the Scotch lawyer, it must be kept in view, (1) that the heir-at-law cannot be burdened with payment of debts by testament; (2) that a disponent may; (3) that a power to sell heritage, given to an executor in the most express terms, not being annexed to a conveyance of the estate, is only a mandate, and is therefore ineffectual, on the principle that a mandate cannot be exercised after the death of the mandant. In the event, therefore, of the disponent refusing to concur in a sale, the executor, it would seem, must either pay the debts and bring an action of relief, or leave the creditors to enforce their claims against the heir as the party primarily liable.

riorities for the benefit of the trust estate (a). But companies vested with authority to carry through compulsory purchases of property cannot enforce the sale of superiorities (b). Where the power to sell depends on implication, we would recommend trustees not to sell without first having their powers fixed by a decree of declarator pronounced *causa cognita*. It may be inferred from the decision in *Kinloch's* case (c), that the Court will not entertain the question under a petition; but the expense of an unopposed declarator would not be materially greater.

Powers of
Tutors and Ju-
dicial Officers.

In the case of tutors and judicial officers holding only general powers, the rule prohibiting the disposal of heritage has been very rigidly enforced. To justify a sale, there must be, as Lord Deas has observed, a "legal necessity" (d). This, we presume, is equivalent to saying, that when the existence of the trust is endangered—*e.g.*, by dilapidation of the property, the use of diligence, etc., a power of sale will be granted. The cases have been collected by Mr Thoms (e). It would serve no good purpose to recapitulate them, as they import, in substance, nothing more than a natural reluctance on the part of the Court to sanction the disposal of trust property; shown by the substitution of an ideal "necessity" in place of that sound discretion which, in ordinary matters, must determine the course of administration.

Power some-
times equiva-
lent to a Direc-
tion.

As a purpose of distribution amongst legatees may imply a power of realizing the estate; so, conversely, a power of sale may be so expressed as to manifest an absolute intention in the mind of the testator that the property should be sold, and may thus be equivalent to a direction. The criterion of intention to sell in questions as to the conversion of the succession, is whether the exercise of the power was *indispensable* to the carrying out of the trust. This test was proposed by Lord Fullerton; and sanctioned by the House of Lords, in *Buchanan v. Young* (f). If trustees exercise a power of sale upon reasons of expediency, although there is no breach of duty on their part, the succession remains unconverted.

(a) *Moore's Trs. v. Wilson*, 25 June 1814, F. C.

(b) *Todd v. Clyde Trs.*, 29 Nov. 1843, 6 D. 108.

(c) *Infra*, p. 487.

(d) *Pet. Maconochie*, 3 Feb. 1857 19 D. 366.

(e) Thoms, *Jud. Fact.* p. 242 *et seq.* An express power may be exercised by a judicial factor. See *Muller's case*, *infra*, 486.

(f) *Buchanan v. Young*, 15 May 1862, revg. 22 D. 979.

The distinction between powers and directions to sell is chiefly interesting as affecting the character of the succession in the person of the beneficiary, and in its transmission to his legal representatives. The distinction is, however, sometimes of considerable moment even in a question as to the authority of the trustee; for a mere *power* of sale, qualified by conditional expressions, is equivalent to a direction *not to sell* except in the event of the condition attaching (a). For our present purpose, it is sufficient to state the main principles of interpretation, as developed in the leading cases (b).

Distinction
betwixt Di-
rection and
Power as af-
fecting Trus-
tee's discre-
tion.

A mere power of sale is not equivalent to a direction to sell, and has not the effect of giving to heritable property the character of a moveable succession (c). On the other hand, a power coupled with a trust, express or implied—that is, with expressions clearly indicative of the testator's intention that the power should be exercised—will be regarded as equivalent in law to a direction. A power of sale will, accordingly, be effectual to convert heritage into personal succession, if in the ultimate direction of the trust deed, the purpose is a division of the entire estate into legacies or shares of succession, and not a conveyance of the residue as it may stand to the beneficiaries (d).

Constructive
conversion,
from Heritable
to Moveable
Estate.

In the case of *Angus v. Angus* (e), the doctrine was for the first time distinctly laid down, that heritable property forming part of a fund for division should follow the rules of personal succession. The trust deed conveyed property, partly heritable, partly moveable, accompanied by a power of sale, but without any direction to realize. The purpose of the deed was, however, for ultimate division of the entire estate into four equal shares, of which one was to be conveyed to the testator's son, William Angus. William having predeceased the testator, his heir-at-law claimed the entire share, in so far as it consisted of unconverted heritage; but the Court found that the

Power coupled
with purpose
of distribution
equivalent to
a Direction.

(a) See the cases of *Spiers and Gardner*, *infra*, 485; and *Buchanan v. Young*, *ut supra*.

(b) See subsequent chapter on Constructive Conversion, where the cases are distinguished.

(c) *Blair v. Blair*, 16 Nov. 1849, 12 D. 97; *Strachan v. Mowbray*, 21 Feb. 1843, 5 D. 687; *Spiers v. Spiers*, & *Gardner v. Ogilvie*, *infra*; and see

Burrell v. Burrell, 14 Dec. 1825, 4 S. 314; *Durie v. Coutts*, M. 4624.

(d) *Adv.-Gen. v. Blackburn*, 27 Nov. 1847, 10 D. 969; *Angus v. Angus*, and *Buchanan v. Young*, *infra*; and see the Exch. cases cited in *Adv.-Gen. v. Smith*, *supra*.

(e) *Angus v. Angus*, 6 Dec. 1825, 4 S. 279.

succession in question, being a right to a share of general residue, was moveable, and decree was therefore given in favour of the executors.

Exchequer
Cases

The cases in Exchequer relating to the incidence of legacy duty are undoubtedly of some authority in questions as to the powers of trustees for sale; though in questions of succession they are to be received with caution (*a*). In the case of the *Advocate-General v. Ramsay's Trs.* (*b*), legacy duty was found to be exigible, on the ground that the power of sale was coupled with expressions indicative of an intention that the power should be exercised in furtherance of the purposes of the trust. In the later cases of the *Advocate-General v. Williamson* (*c*), and *Re Holford* (*d*), where the direction was to sell in order that the "profits might be made part of the residue of the estate," the defence was, that the power of sale was unnecessary, and had not been exercised. But this circumstance was justly held immaterial in a question as to the incidence of the tax; since the right of the Crown in virtue of the statute depended on the terms of the testamentary instrument, and could not be defeated by any subsequent act of the trustee or beneficiary. On this principle, it was decided in the case of *Evans* (*e*) that the actual conversion of heritable property into cash, in virtue of a bare power, did not render the estate liable to duty, there being no direction to sell expressed or implied. However, it has since been held, that if trustees are clothed with an arbitrary discretion either to convert for behoof of the beneficiaries, or to dispose the estate specifically, the character of the succession as regards the incidence of taxation is determined by the event; and therefore, if the estate be sold, legacy duty is due (*f*).

Succession
Cases.

In the later Court of Session cases upon the descent of beneficial interests, the principles of interpretation have been somewhat different. For our present purpose it is sufficient to say, that the Court look to the whole scope and tenor of the testamentary instru-

(*a*) See the subsequent Chapter on Constructive Conversion.

(*b*) *Adv.-Gen. v. Ramsay's Trs.*, 2 Cr. M. & R. 224, note.

(*c*) *Adv.-Gen. v. Williamson*, 16 Mar. 1843, 2 Bell, 89, affg. 23 Jan. 1840, Exch. Rep.

(*d*) *Re Holford*, 1 Price, 426.

(*e*) *Re Evans*, 2 Cr. M. & R. 286. See *Adv.-Gen. v. Smith*, 15 June 1854, 1 Macq. 760, affg. 14 D. 585, and Ex. Rep.

(*f*) *Adv.-Gen. v. Hamilton*, 22 Feb. 1856, 18 D. 636; *Attorney-Gen. v. Simcox*, 1 W. H. & G. 749. See *Attorney-Gen. v. Mangles*, 5 M. & Wel. 120.

ment, for the purpose of discovering whether the settlor had or had not expressed an intention of dealing with his heritable estate as money. Thus, in the cases of *Spiers* and *Gardner* (a), where powers of sale were given, to be exercised "if necessary," and the ultimate purpose was held to be a specific conveyance of the residuary estate to the heirs of the destination, the Court held that the succession was heritable. Again, in the case of *Buchanan v. Young* (b), where the direction was to "pay over" the residuary estate to a plurality of beneficiaries, subject to a power of sale, to be exercised "if necessary," the same view was taken as to the character of the succession in the Court of last resort.

The subject of the execution of powers of sale having been discussed in another chapter (c), we merely note that trustees acting within their powers are understood not to be subject to any personal liability, on the alleged ground that the sale was unnecessary, or that the estate was sold for an inadequate price, provided they have acted within their powers.

Exercise of
Power of Sale.

The leading cases are *Clelland v. Brodie* (d), where the question was tried at the instance of a beneficiary; and *Fleming v. Campbell* (e), an action at the instance of a partner against directors of a trading company. On the question of *power*, it is important to observe, that the revocation of a trust purpose carries with it a revocation of a power given with a view to the execution of that purpose (f).

Parties who purchase trust property ought to satisfy themselves that the trustees have power to sell; otherwise they run the risk of losing their money. Ignorance of the purposes of the trust will not avail as a defence to an action of reduction. The case of the *Magistrates of Airdrie v. Smith* (g) illustrates the danger of purchasing incautiously from trustees. The committee of management of a public school attached to the chapel of ease in Airdrie had sold the school-house to a private purchaser, with the intention of applying

Purchasers
ought to satisfy
themselves as
to Power.

(a) *Spiers v. Spiers*, 21 Nov. 1850,
13 D. 81; *Gardner v. Ogilvie*, 25 Nov.
1857, 20 D. 107.

(b) *Buchanan v. Young*, 13 Mar.
1860, 22 D. 979, revd. 15 May 1862.

(c) Chapter XVII.

(d) *Clelland v. Brodie*, 20 Nov. 1844,
7 D. 147.

(e) *Fleming v. Campbell*, 25 June
1845, 7 D. 935.

(f) *Grindlay v. King*, 8 Nov.
1853, 16 D. 27.

(g) *Mags. of Airdrie v. Smith*, 13
July 1850, 12 D. 1222; see *Mitchell*
v. Major, 12 Nov. 1856, 19 D. 30.

the proceeds in payment of the debts of the chapel. This pious fraud was resisted by the magistrates of the burgh, who succeeded in having the sale set aside; the purchaser being left, as Lord Mackenzie observed, to get back the price if he could,—if otherwise, to bear “the penalty of entering into a bargain which he knew he was not entitled to make” (a).

Reduction of
Sale.

But a purchaser will not be permitted to take advantage of immaterial deviations from the terms of the trust provisions, for the purpose of getting quit of his bargain (b). As a contrast to such cases, we may mention the case of *Duff*, in which the ground of reduction was, that the seller, a curator, had sold the property after the death of his ward, and when he was necessarily *functus officio* (c).

Powers of
Borrowing
upon Secu-
rity.

It could easily be shown by an analysis of the authorities, that there is no limitation of the powers of trustees at common law in the matter of *borrowing* money for the purpose of carrying into effect the provisions of the trust. If the money is required, and can be obtained on the personal credit of the trustees, the sum received will of course be placed to the credit of the trust; and on repayment with interest, it will form a proper charge against the fund divisible amongst the beneficiaries (d). In transactions of this kind, it may be said, in a sense, that the security of the trust estate is pledged, because all debts properly and *bona fide* incurred for the benefit of the estate form a preferable charge upon its revenues. Indeed, we feel warranted in saying, though we cannot refer to any recent authority on the subject, that a trustee obtaining advances on his own credit for a necessary object,—as, for example, to complete buildings begun by his constituent, or to pay off creditors who were threatening to attach the property,—would be entitled to retain the estate in his hands as against the beneficiaries until relieved of his obligations (e). But he could not *burden* the property without special authority. The distinction is a substantial one. The beneficiary is entitled not only to the value of the property left to him, but to the *corpus* of the estate, if he chooses to take it with its

(a) 12 D. 1229.

(b) *Sinclair v. Trail*, 17 July 1847, 9 D. 1515. See *Muller v. Dixon*, 11 Feb. 1854, 16 D. 536, where a judicial factor upon a marriage-contract trust was held entitled to exercise a power of sale.

(c) *Duff v. Gorrie*, 23 May 1849, 11 D. 1054.

(d) Bell's Pr. § 1998.

(e) *Dewar v. Ross*, 1767–8, Bell's Oct. Ca. 541.

liabilities. Now, borrowing upon security, more especially if a power of sale is added, is a sort of alienation. It gives the creditor facilities for attaching and disposing of the property without notice to the beneficiary, which are altogether incompatible with the right of the latter to specific delivery of the estate.

The right to borrow on security must, therefore, result from authority specially conferred by the trustor; and, according to the decision of the whole Court in *Pet. Kinloch (a)*, such authority may be deduced from the terms of the trust deed, "by construction or implication." We have already referred to the more important aspects of this case, as settling the doctrine that the Court cannot supplement the powers of voluntary trustees. The judgment of the Court in this case, while overruling some decisions of a doubtful authority, does not imply any dubiety as to the competency of conferring special powers upon factors or guardians appointed by and subject to the control of the Court of Session (b).

Right to Borrow on Security must flow from the Trustor.

The principles upon which a power to borrow may be deduced by implication, have already been noticed in connection with the subject of powers of sale. Their application to the case of borrowing cannot be attended with any peculiar difficulty; and we are not aware of any case in which such powers have been established by declaratory decision. Where a trust deed contemplates the retention of landed property in the hands of trustees for any considerable period—with an ultimate purpose, not of division, but of specific conveyance—and at the same time authorizes an expenditure of money, during the continuance of the trust, greater than the revenues of the estate will afford, we should consider that a power of borrowing upon security was implied. If trustees are authorized, either expressly or by implication, to borrow on the security of the estate, it follows that they have power to grant a bond and disposition in security, which necessarily contains a power of sale. Without such a power, a loan could not be obtained except at high interest, and with collateral security (c).

May be conferred by implication.

(a) *Pet. Kinloch & Ors.*, 7 Dec. 1859, 22 D. 174. See *Dewar v. Ross's Trs.*, 1792, Bell, 541, where a power to borrow was held to give by implication the right of granting dispositions in security.

(b) Per the Lord Pr. M'Neill, 22 D. 177; see also *Pet. White*, 7 Mar. 1855, 17 D. 599.

(c) See *Stewart v. Kirkaldy*, 14 Nov. 1849, 12 D. 73.

Tutors cannot
grant Bond
over Entailed
Estate.

It has been decided, in conformity with the opinion of both Divisions of the Court, that the tutors of an heir of entail cannot exercise the power conferred by the 21st sec. of the Act 11 & 12 Vict. cap. 36, of granting a bond and disposition in security over the property. This decision will, we presume, apply to the case of testamentary trustees charged with the management, during minority, of property either entailed or to be entailed under the powers of the settlement.

We are not aware that any special authority is requisite to enable trustees to borrow money upon the security of moveable property, such as ships, stock in trade, etc. The ordinary powers of realizing and changing securities, inherent in the office of a private trustee, would, in the absence of express directions to the contrary, entitle him to raise money by the sale of moveable property. Should circumstances render an immediate sale inexpedient, he would seem *a fortiori* to have the power of pledging the property in security of advances.

Powers of
Trustees to
Borrow for
purposes of
Charitable
Trust.

In the administration of funds appropriated to charitable or other permanent objects, it may sometimes be necessary or expedient to incur liabilities beyond the extent of the income for the year. Advances made to meet a temporary exigency will be sustained to a moderate extent, as a charge upon the trust estate; but the trustees cannot, without a breach of trust, make such inroads upon the capital as will impair the efficiency of the fund as a source of permanent revenue. "I have no conception," said Lord Medwyn in the case of *M'Leish (a)*, "that if the trustees, on their own responsibility, borrow money, or lay out a large sum on repairs in any year, they will be bound to make the whole a deduction from the receipts of that year, so far diminishing the payments to the objects of the charity; or that they may not pay off such sums by instalments in subsequent years."

Where trustees of a fund mortgaged for the benefit of the poor of the town of Forfar overdrew their bank account to the extent of nearly L.500 (their annual revenue amounting at that time to L.205, 5s.), for the purpose of granting relief at a period of unusual distress, the Court refused to find that the lands of the mortgification were adjudgeable for the debt, but sustained the expenditure as a charge upon the trust funds, and, of consent, allowed the

(a) *M'Leish's Trs. v. M'Leish*, 25 May 1841, 3 D. 922.

debt, with accruing interest, to be paid by instalments out of the annual revenue. The Court were unanimously of opinion, that they could not allow the capital to be encroached upon; Lord Jeffrey remarking, that if the managers had been dealing with a usurer of the Shylock class, who would insist on immediate payment, they might have been made personally responsible. The observation was not intended, as we read it, to throw any doubt on the right of the managers ultimately to obtain relief out of the revenues of the charity (a). The case of *Brown v. Thomson* (b) shows that the Court will not give encouragement to personal actions against the managers of foundations.

When money is borrowed without authority on the security of heritable property, risk attaches both to the borrower and lender. If the sum has been necessarily expended—that is, in accordance with the truster's intention—it will form a debt against the beneficiary only in so far as the value of the property is increased by the expenditure. The beneficiary may renounce the succession; and if the debt is in excess of the value of the property, the trustee will be liable for the deficiency, as was found in the case of *Lawson v. Walker* (c). On the other hand, the creditor may lose his recourse against the trust estate in the event of the money being improvidently expended or misappropriated. This was the principle of the decision in *M'Millan v. Armstrong* (d), in which the security was held good only to the extent of the sum which could be shown to have been applied in fulfilment of the trust purposes. Lord Moncreiff dissented from the judgment, on the ground that the property disposed in security was not part of the original trust estate, but a purchase made by the trustees for the purpose of investment; and he would seem to have been of opinion (e) that, although the investment itself was not to be approved of, yet the powers of the trustees in dealing with it would be as extensive as if the fund had remained personal: *Surrogatum sapit naturam ejus, in cuius loco surrogatur*.

Results of
Borrowing in
excess of au-
thority.

By the Act 1696, c. 8, fathers are empowered, while in *liege poustie*, to name tutors and curators to act for their children after

Powers of
Guardianship.

(a) *Arbroath Bank v. Stevenson*, 16 June 1847, 9 D. 1228.

(b) *Brown v. Thomson*, 20 June 1849, 11 D. 1182.

(c) *Lawson v. Walker*, 2 Dec. 1845, 8 D. 232.

(d) *M'Millan v. Armstrong*, 6 Dec. 1848, 11 D. 191.

(e) 11 D. 208.

Appointment
by Father.

the appointer's death. When, therefore, a father appoints his trustees to be tutors and curators to his minor children, the powers of the trustees in the matter of guardianship will be such as the law confers upon guardians generally, with such additional powers as the deed may specially appoint. Tutors-nominate, who do not require to find caution, appear to stand in substantially the same position as trustees, with reference to the source from which they derive their authority; and we apprehend that the Court would in future consider itself bound to refuse applications for special powers on the part of tutors-nominate. Curators, being only required to act as consenting parties (which is almost necessarily a discretionary duty), are less likely to be embarrassed in consequence of the omission to clothe them with authority for any purpose of administration.

Appointment
by a stranger.

Any person making a gratuitous conveyance of property to a minor is entitled to appoint curators for him; whose powers, however, are limited to the management, on his behalf, of the property so conveyed. Such appointments are regarded as conditions annexed to the gift of property, with reference to its disposal and management; and are effectual to exclude the management of ordinary curators as to the property so conveyed; but it has been held that a nomination of this kind does not prevent the minor from choosing curators for himself (a). It is doubtful whether the appointment of tutors and curators by a stranger gives a trustee the powers, or imposes upon him the responsibilities, of the office of guardianship. The general opinion is, that it is merely equivalent to a direction to protect the interest of the minors to the best of his ability (b). As the offices of trustee of the estate and testamentary tutor or curator are distinct, it has been held that the donee may accept the one trust though he declines the other (c); and under the statute 1696, cap. 8, the offices of tutor and curator-nominate may be disjoined.

Responsibility
of Tutor or
Curator *qua*
Trustee.

Testamentary curators, appointed by a stranger, being merely invested with a quasi power of guardianship, do not seem to be sub-

(a) *Wilson v. Campbell & Others*, 10 Mar. 1819, F. C.

(b) *Fraser*, II. 77; *Bell's Ill. Ill.* 28; *More's Notes*, 35, 36. However, it was found in two early cases that testamentary tutors were bound to make up inventories (*Kirkpatrick v.*

M'Alpine, 1793, M. 1638; *Hamilton v. Hawkins*, there cited; and see *Hume*, Sess. Pap. in Adv. Lib., "Winter 1789-90," No. 118).

(c) *Mollison v. Murray*, 19 Dec. 1838, 12 S. 237.

ject to the statutory responsibilities of legal guardians. A testamentary tutor so called, when appointed by a stranger, is in reality only a curator. His powers do not extend to the custody of the minor's person; and it is difficult to see in what respect his powers would differ from those of a mere trustee. Whether appointed under the name of tutors or curators, we apprehend that the provisions of the recent statute, exempting trustees from joint responsibility, must be extended by construction to such guardians. With regard to the duty of making up inventories, it has been generally held, that as the trust deed itself shows the extent of the property placed under their management, curators appointed by strangers are not under any obligation to comply with the requisitions of the Scottish statutes (a). The remarks we have just made, regarding the powers of testamentary curators, will also apply to the case of procurators charged with the custody of property bequeathed to any insane or imbecile persons.

In connection with this subject, we may refer to a curious case, which raised the question, whether a party was entitled to appoint a curator to himself in contemplation of his own supervening incapacity. The case came before the Court in a petition from the parties so selected, to be appointed curators; and the judges being satisfied that the unfortunate gentleman was in possession of his faculties at the time when he foresaw the calamity that ultimately overtook him, gave effect to his wishes; but, at the request of his relatives, conjoined a third party along with those nominated by himself (b).

Appointment
of Guardian to
self.

The power of advancing a portion of the capital of a fund for the maintenance of liferenters must be the subject of express grant. Accordingly, trustees will not be allowed to take credit for sums advanced out of capital for the maintenance and education of a family, where those purposes are, by the directions of the settlement, to be provided for out of the interest (c). But if the deed contains no provision, or one which is manifestly inadequate for the sustenance of the grantor's family during the period of minority, the trustees may provide the necessary means out of the estate; for they

Powers of
making ad-
vances.

Alimentary
advances.

(a) Accordingly, the soundness of the decisions to the contrary has been questioned by Prof. J. G. Bell, Prof. More, and Mr Fraser; *supra*, p. 490 (b).

(b) *Todrick v. Sibbald*, 9 Mar. 1833, 11 S. 561.

(c) *Heriot's Trs. v. Fyfe*, 8 Mar. 1836, 14 S. 670.

are bound, as the settlor's representatives, to aliment his family (a). Authority has sometimes been granted to trustees by the Court to make advances out of the capital of the trust estate for the maintenance and education of the family; but the judges have latterly shown an indisposition to interfere with the management of private trusts. In the case of *Hamilton*, Pet. (b), the Court authorized trustees to advance a small sum for the current year's expenses, and intimated that they would entertain a motion in future years, if necessary. But in the most recent case (c), a similar prayer was refused, on the ground that the vesting of the fee was rendered contingent by a clause of survivorship. In such circumstances, payment by way of anticipation might have the effect of depriving the eventual legatees of a portion of their succession (d). The right of the beneficiary to the interest of his provision prior to the period of distribution, is considered in the chapter on Legacies.

It seems to have been doubted by the judges who decided *Nisbet v. Tod* (e), whether a power conferred by a settlor, of making alimentary advances, could be exercised by a judicial factor? There seems no good reason why it should not; for such powers do not involve the exercise of an arbitrary discretion, but merely of sound judgment applied to the circumstances and wants of the family.

Power to anticipate distribution.

A power given to an executor of anticipating the period of distribution, will not, unless it is actually exercised, accelerate the period of the vesting of the succession (f).

Power to purchase Lands.

It would be foreign to the object of ordinary family trusts to allow purchases of property to be made either for investment or on speculation. It is not enough that investments of trust money should be safe; they must be such as are capable of being easily realized. Accordingly, investments of trust money on landed

(a) *Dunbar's Trs. v. Shaw*, 13 Nov. 1805, Hume, 265; Pet. *Taylor*, 5 Feb. 1850, 13 D. 948. In the last-mentioned case, the authority of the Court was sought and obtained.

(b) Pet. *Hamilton*, 20 July 1859, 21 D. 1379; 23 May 1860, 22 D. 1095.

(c) Pet. *Mundell*, 24 Jan. 1862, 24 D. 327.

(d) See the English cases,—*Swincock v. Crisp*, Freem. 78; and *Walker v. Wetherell*, 6 Ves. 477. The Court

of Chancery refuse to grant authority to make advances out of funds subject to a destination over (*Lee v. Brown*, 4 Ves. 362; *Worthington v. McCragh*, 23 Beav. 41). This is in precise accordance with the rule laid down in *Mundell's* case.

(e) *Nisbet v. Tod*, 15 Jan. 1848, 10 D. 361.

(f) See the subject of the Accelerating of Vesting treated in Part III.

security must be made by way of loan, and not by purchase. In the case of eleemosynary trusts, indeed, the permanency of landed property and its capacity for improvement marks it out as the best possible investment for such purposes; and it is probable that trustees for charitable purposes would be held entitled to invest in the purchase of land without special authority. But trustees of private trusts holding funds for the ultimate purpose of distribution, would not be warranted in entering into such transactions unless specially authorized. In the case of *M'Millan v. Armstrong* (a), Lord Moncreiff strongly disapproved of such purchases. "It is very clear to me," he observed, "that under this will there was no power given to employ the personal funds of the deceased, after being converted into money, in the purchase of a land estate. The whole scope and the plain terms of the deed import the reverse. And any such employment of the money in a speculative or ambitious purchase was evidently a thing altogether different from a mere investment at interest for security, even in a real or heritable security."

Trustees of mortifications are sometimes empowered by deed or Act of Parliament to take securities or to invest money in land at the sight of the Court of Session. The case of *Hope* (b) shows that the Court have construed somewhat critically the enabling clauses of such instruments.

Where Jurisdiction given to Court of Session.

A trust for the execution of an entail may be in the form either of a direction to entail lands conveyed to the trustees; or it may be in the nature of a trust for the purchase of lands to be entailed on a specified order of heirs. Powers to create entails need not be expressed in technical language, provided a tailzied succession is prescribed, either by specifying the order of heirs, or by reference to the destination in an existing entail (c). And the force of an express direction to entail cannot easily be destroyed by ambiguous expressions in another part of the settlement (d). Authority to execute an entail may be given by power of attorney (e).

Power to execute Entails.

(a) *M'Millan v. Armstrong*, 6 Dec. 1848, 11 D. 207.

(b) *Pet. Hope*, 21 May 1851, 13 D. 985.

(c) Compare *Leny v. Leny*, 28 June 1860, 22 D. 1272, with *Forrest's Trs. v. Forrest*, 14 Dec. 1845, 8 D. 304; *M'Innes v. M'Allister*, 29 June 1827,

2 S. 862; *M'Pherson v. M'Pherson*, 11 June 1852, 1 M'Q. 246; and *Moncreiff v. Menzies*, 20 D. 95.

(d) *Forsyth v. Ferguson*, 14 June 1832, 10 S. 646.

(e) *Pet. Napier*, 4 Mar. 1837, 15 S. 745.

Defective Entail irremediable.

Until the Entail Amendment Act came into operation, an heir possessing upon an imperfect entail had no power to amend it, either directly or by means of a trust; the theory being, that the entail was binding *inter hæredes*, and that any attempt to impose new conditions or additional fetters was a departure from the conditions of the grant. In the case of *Baillie v. Cochrane* (a), this principle, that every entail is complete in itself, was finally established; the House of Lords having concurred with the Court of Session in holding that an obligation to execute an entail, even when contained in a contract of marriage, did not create a trust in the person of the heir to execute an entail, because in the marriage-contract itself an attempt had been made to carry out the purposes of the obligation by means of a procuratory of resignation, in which the conditions were imposed by reference. In *Urquhart v. Urquhart* (b), a supplementary entail having been declared invalid on the ground that it imposed new fetters, the Court, in the same action, set aside the original deed, acting under the authority of the 43d section of the statute, which declares that estates held under a deed of entail defective in one particular may be possessed in fee-simple by the heir in possession.

Entail may now be remedied by means of a Trust.

It is the less necessary now to refer particularly to the authorities, a list of which is subjoined, establishing the proposition, that an entail defective in any particular is irremediable by heirs-substitute (c); because, under the 43d section of the Entail Amendment Act, all imperfect entails are cut down to simple destinations. Hence it follows, that the heir in possession under a defective entail is now entitled, in his character of fee-simple proprietor, either by himself or by his trustees, to execute a new entail of a more binding character. But although the Act protects the heir in possession from any action at the instance of substitutes for contravention, it would in most cases be prudent to have the invalidity of the existing title established by declarator before executing a new entail.

It is a question of intention, on the construction of a *general*

(a) *Baillie v. Cochrane*, 12 Mar. 1857, 2 M'Q. 529, affg. 17 D. 659; *Forbes* 1801, F. C.; *Douglas v. Johnston*, 5 Dec. 1804, F. C.; *Ormiston v. Gammell*, 14 May 1858, 20 D. 917. *Ormiston*, 24 Jan. 1809, Hume, 531;

(b) *Urquhart v. Urquhart*, 19 Feb. 1851, 13 D. 742. *Meldrum v. Mailland*, 29 June 1827, 5 S. 857; *E. of Fyfe v. Duff*, 7 Mar.

(c) See *Watson v. Pyat*, 28 Jan. 1828, 6 S. 698.

conveyance of heritable property to trustees, whether it includes lands held under a defective deed of entail (*a*). If the trust purpose were to entail the lands on the same series of heirs, we think the presumption would be very strong, that the lands in question were meant to be included.

Does a General Conveyance carry Lands held under conditions of imperfect Entail?

Powers of entailing, when constituted by reservation, are strictly construed; and the framing of such provisions is therefore a matter of some delicacy, demanding not only attention to form, but an accurate knowledge of the principles of the law of entail. We may illustrate our meaning by referring to the case of powers reserved by marriage-contract to entail property destined to the heirs of the marriage, or to impose additional fetters on the heirs. In order that such powers may be practically operative, it is not enough that the contracting party reserves the right of making an entail, either in general terms, or by reference to the prohibitory and resolute clauses which he proposes to adject. He must, if he means to alter the destination of the marriage-contract, reserve to himself a power of altering the order of succession; otherwise the only entail he will be permitted to execute under the reserved power, will be one in favour of the eldest son and his heirs whatsoever, who by the marriage-contract are considered to have a vested interest in the succession (*b*). Moreover the entail would not be binding, even if executed in favour of that order of heirs; since it has now been decided that an entail to a party and his heirs whatsoever is not within the protection of the statute 1685 (*c*). In other respects the construction of reserved powers of executing entails is similar to that of trusts, along with which, therefore, it may be conveniently considered.

Strict construction of certain Powers of Entailing.

A power to entail lands is defeasible under the Entail Amendment Act, if the direction is defective in any of the prohibitions (*d*), or even though perfect, if the intended institute is a person of full age, born after the date of the settlement; though in the last case it would probably be the duty of the trustees to execute an entail in terms of the trust, if they were not interpellated. The machinery

Powers to Entail defeasible under Entail Act.

(*a*) *Hepburn v. Hepburn*, 10 Feb. 1860, 22 D. 730; *E. of Eglinton v. E. of Eglinton*, 28 May 1861, 23 D. 1869.

Jan. 1826, 4 S. 393; *Macleod v. Macleod*, 1 July 1828, 6 S. 1043.

(*c*) *Leny v. Leny*, 28 June 1860, 22 D. 1272.

(*b*) *M'Neill v. M'Neill's Trs.*, 27

(*d*) 11 & 12 Vict. cap. 36, § 43.

provided by the statute for vacating the trust, is analogous to the process of disentailing; it being provided, that any party (being of full age, and born after the settlement) for whom any landed estate is held in trust, may "make application by way of summary petition to the Court of Session, setting forth the facts, and referring to this Act, and craving the Court to pronounce an act and decree declaring him fee-simple proprietor of such land or estate, and unaffected by any such conditions, provisions, restrictions, or limitations" (a).

Power to
accumulate
Rents or Money
for investment
in Land.

Sometimes trustees are directed to accumulate rents, or the proceeds of investments, for the purpose of purchasing lands to be afterwards entailed (b); or the trust may be to sell landed property for the purpose of purchasing other lands more contiguous to the principal estate. Under a direction of this nature, trustees have been held entitled to lay out an uninvested balance of the money in erecting a mansion (c), or in the purchase of superiorities (d), but not in the commutation of teind or feu duties (e).

Several questions of difficulty have occurred in connection with the construction of powers of sale in combination with directions for the payment of debts and entailing the residue. We may observe, that in construing such powers an important distinction has been recognised between trusts for payment of debts, and trusts relating to the destination of residue. In the former case, a power to sell has been held to be implied, on the ground that as the testator's estate was liable to be sold at the instance of his creditors, he must, in voluntarily providing for the payment of his debts, be held to have contemplated the exercise of such a power. This is in substance the principle of the case of *Erskine v. Wemyss* (f), and subsequent cases (g). But an intention that the estate should be sold for the purpose of adding the proceeds to a fund which has been subjected to the fetters of an entail, will no more be implied, in the absence of an express declaration, than an intention to entail the estate itself would be implied. And therefore, where a trust, for the purpose

(a) 11 & 12 Vict. cap. 36, § 47.

(b) *Beattie v. Johnstone*, 15 Dec. 1849, 12 D. 357; *Strathmore v. Strathmore's Trs.*, 9 July 1856, 18 D. 1212.

(c) *Sprot's Trs. v. Sprot*, 11 Mar. 1880, 8 S. 712.

(d) *Sharpe*, 11 Feb. 1823, 2 S. 203.

(e) *Pollexfen v. Stewart*, 14 July 1841, 3 D. 1215.

(f) *Erskine v. Wemyss*, 13 May 1829, 7 S. 594.

(g) *M'Kinnon v. M'Kinnon*, 4 Dec. 1838, 1 D. 153; and *Henderson v. Somerville*, 22 June 1841, 3 D. 1049.

of creating an entail of lands, contains incidentally a conveyance of other lands, as to the disposal of which nothing is said, these, after payment of debts, must be transferred in fee-simple to the heir-at-law (a). If, however, the trustees are desired to convey the estate under fetters, the direction is binding until set aside in a declarator (b).

It must be kept in view, that trusts which provide for the accumulation of money, whether for the purpose of creating entails or otherwise, are liable to be cut down by the Thellusson Act (c), which now, by the 41st section of the Entail Amendment Act (d), is extended so as to include accumulations of the rents of heritable property, as well as of the interest of money. In the case of *Lord v. Colvin* (e), an opinion was returned to the Court of Chancery, in compliance with the Law Ascertainment Act, to the effect that implied accumulations are equally void as if they were expressed,—an opinion which is in accordance with the most recent English decisions (f). The mode of defeating accumulations is provided by the statute itself; the money is to be “received by such person or persons as would have been entitled thereto, if such accumulation had not been directed” (g). The Act contains an exception with regard to accumulations for the payment of debt, or raising provisions for children.

Illegal accumulations.

It is easy to see that, in the execution of a duty so delicate and responsible as that of creating an entail, many points of difficulty must occur which can only be settled by recourse to litigation. From the number of cases that have arisen in the course of the present century, the duties of trustees acting under general powers are now pretty well settled; but the points arising for consideration under special instructions as to the destination and conditions, will doubtless continue to present new features of interest. In another chapter we have treated fully of the execution of entails under powers (h).

Execution of Powers of Entailing.

(a) *Allan v. Glasgow's Trs.*, 1 Sept. 1835, 2 S. & M'L. 333; *Trotter v. Cunninghame*, 29 May 1849, 11 D. 1066.

(b) *Gilmour's Trs. v. Gilmour*, 6 Dec. 1856, 19 D. 134.

(c) 39 & 40 Geo. III. cap. 98.

(d) 11 & 12 Vict. cap. 36.

(e) *Lord v. Colvin*, 7 Dec. 1860, 23 D. 111.

(f) See *Tench v. Cheese*, 19 Beav.

3.

(g) 49 Geo. III. cap. 98, § 2.

(h) Chapter XVIII.

Power to
Trustee or
Beneficiary to
enter into
personal con-
tracts.

By means of a grant of special powers, a settlor may remove, in any particular case, the disability which attaches to the position of trustees and beneficiaries in regard to entering into lucrative transactions with the trust estate. It is often of advantage, and consistent with the wishes of a settlor, that the individual trustees or beneficiaries should have power conferred upon them to become purchasers from, or tenants of, the trust. Trust settlements frequently empower the trustees to accept the offices of factor and agent to the trust. The utility of this dispensation with the rules of equity is more questionable than in the case of a grant of authority to purchase. In either case the power will be liberally construed (a).

Miscellaneous
Powers.

The powers that may be conferred by grant on fiduciary donees, are evidently as various as those which may be exercised by a fee-simple proprietor. Some of those have been referred to incidentally, in treating of the usual powers of administration. Such are powers of feuing and granting long leases; powers to submit and refer actions or claims; powers to invest in precarious securities, to carry on a going business, or to work minerals. In all cases where the power of a beneficiary to do a particular act, or class of acts, is limited by the common law, the trustee holding for his behoof is subject to the same restriction; a principle which may be illustrated by the case of trustees for liferenters, whose powers in regard to cutting timber and wasting the substance will be similar to those enjoyed by the liferenter under a direct disposition. It is of course competent to the truster to extend the powers of the trustee as he may think proper; and in that event, the responsibility of the trustee will be just the same as that of any other gratuitous mandatary charged with the execution of a particular matter of business. He will not, in the general case, be liable for loss occasioned by transactions involving risk, into which he has entered at the request or by permission of his constituent. It is impossible to define with any hope of success the obligations and duties of trustees clothed with arbitrary powers. For our present purpose, it may be sufficient to advert to the difference betwixt powers *directory* and *imperative*,—a distinction which must enter deeply into questions of liability. A directory, that is, a permissive power, may be given by a testator

(a) *Goodsir v. Carruthers*, 19 June 1858, 20 D. 1141; and see Chapter XVII., Section 3, *supra*.

without any expectation that it will be used; and with no other object than that of leaving the trustee free to act in a particular way, under circumstances not likely to occur. For example, a power of sale may be given to meet possible emergencies, although the intention plainly is, that the estate should be handed over to the heir unimpaired. Or a power may be given to trustees to continue a business if expedient, with the view of avoiding the loss that might accrue from winding up too suddenly. It would be a great abuse of the confidence reposed in a trustee under such circumstances, if he were to interpret such powers as a license to conduct the trust affairs in an imprudent manner. The mere fact that the trustee is acting technically within his powers, will not always relieve him from responsibility for improvident management (a). But where a power is so worded as to have the force of a direction, the trustee has no alternative; his duty is to act upon the opinion of the truster in preference to his own; and the consequences of his obedience, however unfortunate, must be viewed as the act, not of the trustee, but of his constituent.

(a) The doctrine of the English law as to the responsibility of the donee of a power, is thus stated by Mr Lewin (4th ed. 404): "Where a power is given to trustees to do or not to do a particular thing at their discretion, the Court has no jurisdiction to lay a com-

mand or prohibition upon the trustees as to the exercise of that discretion, provided their conduct is *bona fide*, and their determination is not influenced by improper motives." See on this point, *Cowper v. Mantell*, 22 Beav. 231, and cases there cited.

CHAPTER XXII.

OF POWERS OF DISPOSAL, APPOINTMENT,
AND DIVISION.

Division of the
Subject.

THE most extensive power that can be conferred on a party not vested with the actual ownership, is the power of disposal—of regulating the destination of the beneficial interest. In practice, we may distinguish three cases in which a person not enjoying the full beneficial interest may be enabled to exercise the rights of a proprietor as regards the disposal of property. *First*, A settlor, while separating the liferent of an estate from the fee, may reserve to himself along with his own liferent a power of disposal, or he may invest another, upon whom he confers a liferent, with such a power; *secondly*, he may, while disposing of the fee-simple to one person, reserve to himself or to others a power of granting provisions to other persons out of the property; *thirdly*, he may dispose of the entire interest unreservedly to a class of persons, subject to a power of division. Each of those cases is subject to special rules of construction, which we shall investigate in their order.

SECTION I.

OF LIFERENTS COUPLED WITH POWERS OF DISPOSAL.

I. *Liferent by Reservation, with a Power of Disposal.*

Nature of the
Right.

This combination of rights, of which an ordinary *mortis causa* settlement is the most familiar instance, is equivalent to a fee-simple. And the grantee is held to retain the fee although his right of disposal is restricted to a mere power of altering the order of succession; or of disposal for onerous causes, though in this last case the

restriction, if occurring in an onerous deed, will be personally binding upon the party (a). From this doctrine it follows, that in the event of a lapse occurring through a failure to dispose of the nominal fee or otherwise, the heirs-at-law of the liferenter by reservation take a fee-simple estate.

A brief inquiry into the nature of the right so constituted will suffice to exhibit the soundness of this principle, and the reasons which have led to its adoption by our Courts. If a person has the liferent of a property, and also the right of disposing of it, either after death or in his lifetime—the *jus habendi* and *jus disponendi* of the civilians—it is obvious that, as far as concerns his own enjoyment of the property, he is in reality clothed with all the attributes of a fiar. Again, as the liferent is derived from the disponee himself, a little reflection will show that no doubt could arise even as to the event of intestacy; because the disponer and the disponee in liferent being in fact one and the same person, *his* heirs must of necessity take the succession, whether the fee was or was not, in contemplation of law, transferred with the liferent. Now, if the reserved liferent have truly the character of a fee, both as regards present enjoyment and succession, it must also be so regarded in questions with creditors; for the law will not permit a man to place his property beyond the reach of creditors while retaining the power both of enjoyment and absolute disposal in his own person. As it cannot be shown that a reserved liferent, with a general power to dispose, differs in any respect from a fee, such a conveyance is held to be in fact a reservation of the fee in favour of the disponer,—the disposition to heirs being regarded as a simple destination.

Reason of the doctrine that Liferent by Reservation equivalent to a Fee.

In the case of *Davidson v. Davidson* (b), the principle was tested by an attempted revocation of the destination over upon death-bed. The Court held that such a revocation was incompetent on death-bed; thereby assuming that the attempted exercise of the reserved power was in reality a conveyance by one who was the fiar; for if the power reserved by the liferenter had been *jus meræ facultatis*, it would not have been incompetent to exercise such a power

Liferent with a general power of disposal.

(a) *Coltart v. Corie*, 26 Mar. 1853, 15 D. 606. reservation may adjudge the fee for payment of their debts; *Rusco v. Blair*, 1723, M. 4117; *Elliot v. Elliot*, 1698, M. 4130.

(b) *Davidson v. Davidson*, 1687, M. 3255. The creditors of a liferenter by

upon death-bed (a). The principle was further illustrated in the case of *Cumming v. The Lord Advocate* (b). The liferenter, in that case, having exercised his reserved power after the death of the fiar first instituted in the destination, the latter was found to have had no vested right in the property, and a claim for terce at the instance of his widow was repelled. In *Cumming's* case, the destination was contained in the charter of the lands; but in the case of *Baillie v. Clark* (c), it was introduced into the disposition of the subjects. In other words, the title was taken by the purchaser to himself in liferent, with a reserved power of disposing, and to his son in fee. This, although in form a liferent by constitution, was treated as a reserved liferent, the title having been taken in this form by authority of the purchaser himself. The liferenter having died without exercising the reserved power, his son was held to have taken the lands in the character of heir of provision, and not as a disponee of the seller; and he was, therefore, obliged to colate in consequence of taking a share of the executry.

Liferent with
a limited
power of dis-
posal.

The cases already mentioned are instances of a purely general power of disposal, in conjunction with a liferent by reservation, and with a destination over. If the power reserved had merely been to enable the liferenter to alter the order of succession, or conversely to alienate for onerous causes, but not to touch the succession, of course the argument for making it equivalent to a fee would be proportionately weakened; and we shall see that, even in the case of liferents by constitution, the distinction between general and limited powers of disposal is an element of importance. One or two cases on the construction of limited powers of appointment reserved to the granter, may be briefly noticed.

Reserved
power of dis-
posal *inter*
vivos.

In the case of *Ramsay v. Cowan* (d), the truster by his marriage-settlement conveyed away the general residue of the whole personal estate of which he should be possessed at his death; but not so as to debar him from affecting it "by acts of fair expenditure, or absolute disposal, *inter vivos*, operating against himself." This was held to import a liferent in the truster, with a power of

(a) See Ersk. 3, 8, 98.

(b) *Cumming v. The Lord Advocate*,
1756, M. 4268.

(c) *Baillie v. Clark*, 23 Feb. 1809,
F. C.

(d) *Ramsay v. Cowan*, 11 July
1833, 11 S. 967.

disposal, *inter vivos*, either gratuitously or for onerous causes, but not *intuitu mortis*; and, accordingly, a subsequent deed, intended to create interests of fee and liferent prejudicial to the heirs of the marriage-contract, was found to be ineffectual to alter the succession. In deciding that the settlor had not an unlimited fee, the fact of the power being given in a marriage-settlement received considerable weight. In *Porterfield v. Stewart* (a), a power had been reserved by an entailer of altering the succession generally, which he afterwards executed. The heir first called to the succession made up a title under the original entail, without reference to the deed of appointment, and possession was had on that title for more than forty years. But on the succession opening to the heirs called by the deed of appointment, the Court gave effect to the latter instrument, holding that the right thereby conferred, being *jus mere facultatis*, was not affected by prescription.

Reserved
power to alter
the Succession.

In *Coltart v. Corie* (b), a power to sell, reserved in a mutual settlement by husband and wife "should they find it necessary for their support to do so," was held to be qualified by the condition attached to it; and a disposition bearing to be a recompense for past services was reduced.

Mutual Settlements.

The cases on powers by reservation were reviewed in *Morris v. Tennant* (c) by Lords Cranworth and St Leonards, in whose opinions the doctrine is explicitly laid down, that a liferent by reservation with a power of disposal is equivalent to a fee.

II. Power coupled with a Liferent by Constitution.

The rule of construction in this class of cases is, that a liferenter by constitution, even when armed with the most general power of disposal, is not a fiar; and that the appointee of the liferenter, or failing such an appointment, the donee under the destination over, takes the estate as the heir not of the liferenter, but of the settlor (d). In most of the cases we are about to notice, the conveyance was made in the first instance to trustees; and powers of disposal, variously expressed, were conferred on the parties to

Conveyance
in Liferent
coupled with
power of dis-
posal does not
carry the Fee.

(a) *Porterfield v. Stewart*, 15 May 1821, 1 S. 9.

(b) *Morris v. Tennant*, 27 Jur. 546.

(c) 26 Mar. 1853, 15 D. 606.

(d) On this principle, the heirs of

the destination over were held entitled to confirm as executors of the fee, notwithstanding the existence of a partial power of disposal (*M'Gown v. Kinlay*, 4 Dec. 1835, 14 S. 105).

whom the annual proceeds of the estate were directed to be paid over. The interposition of a trust for the purpose of keeping the fee and liferent distinct, would of course make it more difficult to suppose that a constructive fee was given to the liferenter; but the Courts do not appear to have gone very much on this consideration; and accordingly we find in the case of *Baine v. Craig*, where there was a direct mutual disposition between spouses to their own liferent use, fee to the children, subject to a power of disposal, the Court did not regard the addition of the power as equivalent to a fee in the liferenters, but gave effect to the destination, according to the natural meaning of the words, to the extent of the one-half of the property to which they assumed the wife had right (a). In the recognition of this doctrine, effect is given to the reasons which the testator may be supposed to have for withholding the full and absolute dominion of the property, while giving to his immediate heir a voice in the disposal of it. For example, a testator may wish the capital to be left in the hands of trustees during the lifetime of his widow or daughter, with the view of constituting an alimentary provision in her favour, and may at the same time be willing that she should be as entirely unfettered in the disposal of the fee as if the property were her own. Or he may be willing that any appointment of heirs by the liferenter should receive effect in preference to the right of his heirs; and may yet prefer his own heirs-at-law to the heirs-at-law of the liferenter, who would of course be entitled to the succession if the conveyance had been absolute. Again, it may be desirable to give the use of the capital to the liferenter as a fund of credit, with a power of sale to meet emergencies; in which case the power of disposal will be a general one. It is on such considerations as these that the interpretation of faculties of disposal has come to depend.

Leading Cases
on Powers of
Disposal.

Re Weddell.

The effect of a disposition in liferent, with a power of appointment, underwent elaborate discussion in three leading cases, each raising the question in a different way. In the case of *Weddell or Ness* (b), a power was given to the testator's widow to appoint by testamentary deed; and the power having been exercised, an action was raised in the Court of Exchequer to try the question, whether

(a) *Baine v. Craig*, 8 June 1845,
7 D. 845.

(b) *Re Weddell*, 3 Feb. 1849, Ex-
chequer Cases.

the estate was subject to inventory duty as property of the widow. In *Morris v. Tennant* (a), the point in dispute related to the exercise of the appointment on death-bed. In *Alves v. Alves* (b), there was no destination over, but only a general residuary clause; and it was contended that the absence of a destination showed that the testator intended the fee to go to the heirs-at-law. The opinions of the judges who decided *Weddell's* case are elaborate and instructive. The result at which the Court of Exchequer arrived was, that an appointee under authority of a deed which empowered the liferenter to bequeath the fee by testamentary deed, was the heir of the maker of the power, and not of the party exercising it,—a result which is obviously inconsistent with the notion of a fee in the person of the liferenter. In *Morris v. Tennant*, a power was given to a liferenter of certain funds under trust, to “settle, destine, and convey” the fee in a certain event, with a destination to other parties in case of failure. It being admitted that a power may be exercised on death-bed, the question argued before the House of Lords was, whether an appointment under this clause (having been made on death-bed) could receive effect as an exercise of a power, or must be regarded as a conveyance of the fee; the argument for the liferenter’s heir-at-law being, that a liferent, coupled with a general power, was equivalent to a fee-simple, distinguishing from *Weddell's* case, in which the power was to be exercised by testamentary deed. The decision, as stated in Lord St Leonards’ exhaustive analysis of the law, was, that a liferent coupled with the largest and most general power of disposal, *and with a destination over*, could not be construed as a fee.

Morris v. Tennant.

The effect of a general power superadded to a liferent, *without an ulterior destination*, has yet to be determined. In all the decisions already referred to, reliance was placed upon the contingent interest of the person instituted as fiar in default of appointment, as being sufficient to prevent the fee from vesting in the liferenter. The nearest approach to the case of a liferent with a general power, but without a destination over, occurred in the case of *Alves v. Alves* (c). A liferent of a certain share of moveable succession was given to

Whether the Interest amounts to a Constructive Fee when there is no destination over.

(a) *Morris v. Tennant*, *supra*.

(c) *Alves v. Alves*, *supra*. In the

(b) *Alves v. Alves*, 8 Mar. 1861, 23 D. 712.

last edition of his treatise of Powers, Lord St Leonards says (8th ed., chap.

the testator's widow, with a general power of appointment. There was no express destination over; but the Court were of opinion that there was a sufficient residuary destination in a previous settlement to exclude the next of kin, whether of the testator or of the liferentrix.

Where the liferent of a sum of fixed amount is charged on residue, so much upon the share of one child and so much on that of others, and a power of disposal of part of the capital is added; then, in the event of the power being exercised, the residuary shares suffer abatement in the proportions in which the liferent interest was chargeable upon them respectively (a).

III. *Exercise of Powers of Disposal.*

General disposition is a good exercise of Power.

Disposal by mortis causa Settlement.—Although it is a settled principle that an appointee does not take the estate as heir of the donee of the power, but as heir of the granter of the power, it has been decided that the donee's general disposition, executed *intuitu mortis*, and even on death-bed (b), carries the estate, on the principle that it is an implied exercise of the power of disposal vested in him (c).

"Residue" includes Property subject to the Power.

In *Smith v. Milne* (d), an executrix under the will of her husband was directed to hold the testator's funds for payment of debts and certain legacies, etc.; and for payment of an annuity to herself of L.50 per annum, subject to certain conditions, with a declaration, that "in case she do not again marry, she is to be entitled to dispose of the residue of my fortune amongst our

iv. § 1, 9), "A devise to A. for life, expressly, with remainder to such persons as he shall *by deed or will*, or otherwise, appoint, will of course not give him the absolute interest, although he may acquire it by the exercise of his power (*Barford v. Street*, 16 Ves. 135; *Hughes v. Wells*, 9 Hare, 767); and the rule applies to personal estate as well as to real estate (*Rath v. Seymour*, 4 Russ. 263; *Scott v. Josselyn*, 26 Beav. 174)." And in the same page (§ 11), he adds, "It is said that where an estate is given absolutely, without any prior limited interest, to such uses as a person shall appoint, it would be an

estate in fee (see Ves. 470; and see *Lord Townsend v. Windham*, 2 Ves. 1; *Hales v. Margerum*, 3 Ves. 299; *Cook v. Duckenfield*, 2 Atk. 565). But this doctrine refers only to a devise; for in a conveyance, such a limitation would merely confer a power on the party, and not give him an estate in fee."

(a) *Bogle v. Bogle*, 16 S. 1271.

(b) *Ersk.* 3, 8, 98.

(c) *Grierson v. Miller*, 3 July 1852, 14 D. 939; *Baine v. Craig*, 8 June 1845, 7 D. 845; *Smith v. Milne*, and *Hyslop v. Maxwell*, *infra*.

(d) *Smith v. Milne*, 6 June 1826, 4 S. 679.

children after her death, in such proportions as she thinks proper." There was no destination over; and the lady, who had never acquired any property of her own, left a will, appointing executors, etc., but without any reference to the power of appointment conferred by her husband, and giving and bequeathing *the whole free residue of her subjects and effects* to her children therein named, in certain proportions. The judges were unanimously of opinion, that this was a good exercise of the power of appointment; and the absence of any ulterior destination in the husband's will was adduced as explanatory of the circumstance, that the executrix had disposed of the property in her own name. And where a power was given by a testator to his niece, "by will or other deed under her hand, to dispose of and convey as she may think proper, after her decease, the capital sum of L.2000, to be set apart by my trustees for answering her annuity," it was held that a general settlement, executed before the death of her uncle, and therefore before *his* settlement took effect, was sufficient to carry the fee of the money left to her disposal (a). Powers of disposing of shares of the price of heritable property directed to be sold, and of funds invested on heritable security, have been held to be effectually exercised by testament (b); and on principle, it may be affirmed that dispositive words are not essential. A power of disposal conferred on trustees is sufficiently exercised by a deed disposing of the specific fund. The recital of the power is not essential to the validity of the deed of appointment, though in practice it is never omitted (c).

Power exercised by leaving previous general settlement unrevoked.

When a power is reserved of altering the order of succession, it would seem that one deed of alteration will not exhaust the power (d). The deed of appointment must, of course, be a deed of the nature contemplated by the trust. And therefore, where the original deed of settlement reserved to the granter a power of affecting the property by acts of fair expenditure or absolute disposal *inter vivos*, the Court held that a power in those terms would not entitle the granter gratuitously to alter the succession to the property (e). And where

Exercise of limited power of disposal.

(a) *Hyslop v. Maxwell's Trs.*, 11 Feb. 1834, 12 S. 413.

(b) *Grierson v. Miller*, *supra*; *Smith v. Taylor*, 17 Feb. 1836, 13 S. 502.

(c) *Cunninghame v. M'Leod*, 12 Aug.

1846, 5 Bell, 252, 257, per Lords Brougham and Campbell.

(d) *Scott or Glendonwyn v. Maxwell*, 22 May 1850, 12 D. 932.

(e) *Ramsay v. Cowan*, 11 July 1833, 11 S. 967.

a party, by his ante-nuptial contract, had conveyed his estate to the heirs of the marriage, and reserved a power to make an entail, prohibiting alienations and the contracting of debts, it was held that an entail which prohibited alteration of the succession was *ultra vires* of the contract (a).

Execution of Power conferred by direct conveyance in *liferent* and fee.

Where a *liferenter* is invested with a general power of disposal by deed, a variety of questions may occur regarding its execution *inter vivos*, the solution of which will depend upon the nature of the original settlement.

Appointment by Deed *inter vivos*.

If the property is held under a *direct conveyance* in *liferent*, with a general power of appointment, and a destination over, it is clear that, as soon as an appointment is executed by deed *inter vivos*, the fee will vest in the appointee subject to the burden of the *liferent*, and the contingent reversionary interest will, *ipso facto*, become discharged. Further, there can be no impediment in the case supposed to a discharge of the *liferent*, with the view of conferring an absolute fee upon the appointee. But if we suppose the case of a settlement which vests the property in *trustees*, with a direction to pay over the annual proceeds to the settlor's widow or daughter during her lifetime, subject to a general power of appointment in her favour, the question is attended with greater difficulty. We should consider that in that case (especially if the fund were declared *alimentary*) the party would not be safe in accepting a discharge by the *liferentrix*, and transferring the property to her appointee (b). However, there is room for maintaining that the consent of the lady and her guardians would validate the transaction, on the principle that there would then be no party *in titulo* to call the trustees to account as for a breach of trust.

Discharge of *liferent* makes the Fee absolute.

If *Liferentrix* discharge her interest, Appointee may immediately demand a conveyance from Trustees of the Settlement.

The decisions of the Court, however, have gone somewhat beyond the line indicated in the preceding paragraph; and it must now be considered a settled point, that a *liferentrix* under trust may, at any time, tender a discharge of her interest, and call upon the trustees to denude in favour of the *fiar*. In the cases of *Pretty* and *Martin*, which we are about to notice, the *fiar* was nominated in the settlement itself; but the principle is of course the same, though he be nominated by the *liferentrix* in virtue of a general power of appoint-

(a) *Supra*, p. 388.

Balderston v. Fulton, 23 Jan. 1857, 19

(b) See opinion of Lord Deas in D. 299.

ment. In the case of *Pretty v. Newbigging* (a), a fund was conveyed to marriage-contract trustees, for the purpose of providing an annuity to the widow, and after *her* death to be divided among the children of the marriage. The lady survived her husband; and upon her only son coming of age, she renounced the liferent and obtained decree against the trustees, finding that they were bound to denude in favour of her son. We may remark, that the settlement, which was *not alimentary*, contained a destination over to the truster's grandchildren in case of the death of any of his children before the fund should be paid or become payable. Lord Rutherford held, that in a *mortis causa* settlement such a clause would have prevented the vesting of the fee until the expiration of the liferent, by reason of the grandchildren being called as conditional institutives; but in a marriage-contract, he thought the presumption was for immediate vesting. The whole Court were eventually consulted, and the Lord Ordinary's finding was adhered to, Lord Justice-Clerk Hope dissenting in an elaborate opinion. It would seem, therefore, that a liferenter with a general power of appointment may indirectly transfer the entire estate, by appointing to the fee and afterwards discharging the liferent.

In the case of *Martin v. Bannatyne* (b), the same question was raised in a different form. There was a conveyance in the marriage-contract of thirty bank shares to the spouses in conjunct liferent, with a liferent to the survivor as an alimentary provision for self and children; and failing children, to the widow, her heirs and assignees, in fee. There were no children; and accordingly Lord Neaves, and afterwards the Court, sustained the widow's *jus exigendi* as fiar in an action against the trustees. Another fund was destined in similar terms, with this difference only, that the fee was vested in the husband, who, by a testamentary settlement, appointed his wife his sole executrix. With respect to this fund also, the Court, altering the judgment of the Lord Ordinary, also held that the widow was entitled to immediate payment; on the ground that as the liferent was made *alimentary* by marriage-contract, the restriction on the right of alienation was intended to protect the property against the husband's deeds, and fell with the dissolution

Same result if
Liferentrix
acquires the
Fee by Suc-
cession.

(a) *Pretty v. Newbigging* (Hunter's Tr.), 1 Mar. 1854, 16 D. 667.

(b) *Martin v. Bannatyne*, 8 Mar. 1861, 23 D. 705.

Exception
when Mar-
riage subsist-
ing.

of the marriage. Even in the case of a provision secured by a testamentary writing, its alimentary character will subsist, pending the marriage, notwithstanding the union of the liferent with the fee. Thus, in *Balderston v. Fulton* (a), where the fee had vested (in default of nearer heirs) in a lady who already liferented the property, under a trust excluding her husband's *jus mariti*, the Court refused to order the money to be paid over to her husband.

Appointment
in favour of
Creditors.

The nature of the right conferred on the party who is invested with a *general* power of appointment, would seem to argue that such powers may be executed for the benefit of the creditors of the donee of the power; because there is, *ex hypothesi*, no restriction on his power of appointment. This was assumed in two of the earlier cases, *Rollo v. Rollo* (b), and *Watt v. Tawse* (c). It would seem, however, from the decision in the former case, that the appointment must be express; a general disposition to creditors not being effectual to carry an estate over which the disponent has only a *jus facultatis*. At the period of that decision, the law was still unsettled on the question, whether a liferent with a power of disposal amounted to a fee; and the decision was still further complicated by the consideration, that the property was vested in trustees for the very purpose of protecting it from the diligence of the donee's creditors. And the Court seem to have been of opinion, that there was no intention, on the part of the donee of the power, of including the property in question amongst the subjects conveyed by his general disposition.

Can Creditors
enforce the
execution of a
Power of Dis-
posal?

Another question argued in the case of *Rollo*, was whether the creditors of the donee of the power have a preferable claim to the property, and whether such creditors could compel the donee to exercise the power in their favour. In support of the affirmative, reliance was placed on the dictum of Lord St Leonards, who observes, "Equity holds that where a man has a general power of appointment over a fund, and he *actually exercises the power*, whether by deed or will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors, in pre-

(a) *Balderston v. Fulton*, 23 Jan. 1857, 19 D. 293; see *Torry Anderson v. Buchanan*, 2 June 1837, 15 S. 1073.

(b) *Rollo v. Rollo*, 26 Jan. 1843, 5 D. 446.

(c) *Watt, etc. v. Tawse*, 21 Nov. 1829, 8 S. 107.

ference to the claims of his legatees or appointees" (a). These questions are still open. The doctrine laid down by Lord St Leonards in deciding the case of *Morris v. Tennant* (b), namely, that there is no fee in the donee of the power under the English or Scotch law, is certainly adverse to the recognition of any claim, on the part of his creditors, as against the appointee. The forms of procedure in our law are also opposed to the notion of enforcing a party to execute a deed which he is merely under a moral obligation to grant. It is clear, to our thinking, that the power of appointment, being in its nature discretionary, could not be attached by adjudication, so as to enable the creditors to execute it in favour of a trustee for themselves; and we suspect that the creditor's only remedy would be by the use of personal diligence for his debt, under the pressure of which the donee might be induced to exercise the power, and so to convert his inchoate interest into a right more directly available to his creditors.

Sometimes a power is given to a liferenter to appropriate the fee of the property (c). Such powers are rarely given, and we are not aware of any case in which a power of this nature has been the subject of judicial construction; but there can be no doubt of the competency of conferring such a power. No conveyancer would hesitate to accept a title founded on the exercise of a power of appropriation. It is much more common, however, to confer upon a liferenter the power of encroaching on the capital, in so far as necessary for support. Such powers are to be interpreted liberally, the extent of encroachment being in the discretion of the party. But a power of appropriating for one's own use, without limitation as to the amount, will not entitle the appointee to dispose of the property by will or *mortis causa* disposition (d). A power of ap-

Appointment
in favour of
Self.

(a) Sugden on Powers, 8th Ed., Chap. 9, § 3, 11. But an onerous purchaser from the appointee will be preferred, Chap. 9, § 3, 16.

(b) *Morris v. Tennant*, 27 Jur. 546.

(c) It is clear that under a *general* power the donee may appoint himself. "A general power," says Lord St Leonards (Sugd. Powers, 8th Ed., chap. 8, § 1, 4), "is, in regard to the estates which may be created by force of it, tantamount to a limitation

in fee, not merely because it enables the donee to limit a fee, which a particular power may also do; but because it enables him to give the fee to whom he pleases; he has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or his wishes may lead him to do so."

(d) *Sprot v. Pennycook*, 12 June 1855, 17 D. 840.

propriation may be restricted to a particular subject. For example, a testator having left to a lady, resident in his house, "the whole of the furniture in her own bedroom, and any other she may choose for furnishing her house," this provision was interpreted by the Court to mean a power of choosing liberally, but fairly, any other articles of furniture of similar extent and value with the furniture of her own bedroom (a).

Can a Liferent
Interest be
given in virtue
of a Power of
Disposal?

The question has been discussed, whether a power of appointment may be validly exercised by a disposition conveying the life-rent and fee as separate estates. The question involves two points: (1), As to the lawfulness of such destinations *per se*; and (2), As to the extent of the donee's authority under the power.

The first ground of objection arises from the circumstance that the Legislature has prohibited the creation of life-rents to endure beyond the lifetime of parties in being at the date of the settlement, with the addition of the years of minority; the prohibition being now extended to settlements of heritable property in Scotland by the 47th section of the Entail Amendment Act. It has been thought that, as the estate of the appointee is held to flow from the maker of the power, the donee could not give a life-rent interest to a party born after the date of the settlement, although *in esse* at the execution of the power. Lord St Leonards discards this view, as applicable to a *general* power; for, says he, "to take a distinction between a general power and a limitation in fee, is to grasp at a shadow while the substance escapes. By the creation of a power, no perpetuity, not even a tendency to a perpetuity, is effected" (b). But with respect to particular powers, he observes, these have a tendency to perpetuity, which is not obviated by their enabling the donee to limit a fee; for although the donee can dispose of the fee, he cannot, through the medium of a particular power, dispose of the estate, *as if he was seized in fee* of it." It is well established, therefore, that under a particular power, as a power to appoint to children, no estate can be created which would not have been valid if limited in the deed creating the power (c).

(a) *Reid v. Strathallan*, 11 Feb. 1834, 12 S. 426.

(b) Sugd. Powers, 8th Ed., chap. 8, S. 1, § 5.

(c) Sugd. Powers, 8, 1, 6; *Murray v. Bartin*, 7 Ir. Eq. Rep. 95.

Secondly, as to the extent of the donee's authority, there is no reason to suppose that a general power of appointing to the fee of estate, whether given to a liferenter or to a trustee, would not authorize the limitation of a new liferent (a). For the donee might assume the fee, and thereafter dispose the property with such limitations as he pleases. The recent case of *Oxley's Trs.*, noticed in next section, merely decided that the particular powers conferred by a certain deed of settlement were not such as to authorize a disposition of the liferent interest to one child, and the fee to another.

He may in the case of a General Power.

In the event of a failure to execute a power of disposal, the fee will, on the expiration of the liferent interest, immediately vest in the legatee nominated in the ulterior destination, or, if there be no such person, then in the residuary legatee (b). As already mentioned, it has not been decided whether the succession falls to the heirs of the settlor, or to the heirs of the donee of a general power, when the settlement contains no ulterior destination.

Disposal of Fee on failure to execute Power.

SECTION II.

OF RESERVED POWERS OF APPOINTING PROVISIONS.

A party executing a settlement by which a part of his property is placed beyond his control, by being settled on heirs, may desire to reserve to himself the faculty of making provisions for other members of the family. If the settlement is upon a series of heirs, as in the case of an entail or a continuing trust, he may confer a similar power upon those who are to succeed him in the possession of the property, or upon the trustees of his succession. It is not necessary in testamentary instruments to reserve such a power to the grantor himself; and, accordingly, it will be seen that the cases relating to reserved powers of this description have arisen chiefly upon the construction of marriage-contracts and deeds of entail. The construction of such powers is not much affected by the nature of the deed by which they are created; and we prefer, therefore, to take a

Such Powers reserved by implication in Testamentary Settlements;

but must be expressed in Marriage-contracts and Deeds of Entail.

(a) *Currie v. Currie*, 22 Jan. 1835, 13 S. 290.

(b) *Alves v. Alves*, 18 Mar. 1861, 23 D. 712; *Pursell v. Newbigging*, 25 Nov.

1856, 19 D. 71; *Dundas v. Dundas*, 27 Jan. 1837, 15 S. 427; *Henry v. Grant*, 19 Feb. 1824, 2 S. 725; *M'Lean v. M'Lean*, 5 Br. Sup. 444.

general view of the subject,—distinguishing, however, between a power of burdening the estate with provisions, and a power of division.

Effect of a
General Set-
tlement by
Marriage-con-
tract.

It is a general principle affecting the construction of all deeds making provision for children, that, unless the property be conveyed, and that specifically, the father is understood to reserve the power of affecting the property by onerous deeds, which will be preferable to the claims of the children (*a*). In accordance with this principle, it has been held that a destination of property in a marriage-contract to the spouses in liferent, and the children of the marriage in fee, does not limit the husband's *jus mariti*, or exempt the property from liability for his debts (*b*). Payment of provisions granted to children in pursuance of a reserved power, will therefore be postponed to the claims of onerous creditors, even although the children may have been infeft in security; and should they have received payment from the heir, they will be liable for their father's debts to the extent of the sums received (*c*). If the provisions have been secured by infeftment in the name of marriage-contract trustees, the order of liability will resolve into a simple question of ranking, creditors completing a prior title being preferred to the trustees (*d*).

Power reserved
to a Wife.

It has been decided that a married woman, on whom a power of appointing to a limited extent has been conferred by marriage-contract, may exercise the power without her husband's consent—his assent to the faculty being sufficient (*e*). A power to appoint *with the husband's consent*, falls by his death (*f*).

Can a reason-
able Provision
be taken out
of Fund for
Children of a
second Mar-
riage?

The first point to be considered is, to whom an appointment may be made under a power to appoint to children, which involves the important and as yet unsettled question, how far a father who has conveyed the whole or the bulk of his property to the children of a first marriage, or to trustees for their benefit, can be considered to retain an implied power of revocation to the extent of making a reasonable provision for the wife and children of a second marriage (*g*).

(*a*) *Herries, Farquhar, & Co. v. Brown*, 10 Mar. 1838, 16 S. 948. See 521, *infra*.

(*b*) *Jameson v. Strachan*, 27 Jan. 1835, 13 S. 318.

(*c*) *Poole v. Anderson*, 22 Feb. 1834, 12 S. 481.

(*d*) *Macgregor v. Macdonald*, 9 Mar. 1843, 5 D. 888.

(*e*) *Innes v. Farquharson*, 1692; 4 Br. Sup. 30.

(*f*) *Borthwick v. Trades Maiden Hospital*, 1737, M. 4095.

(*g*) *Brodie's Trs. v. Mowbray's Trs.*, 12 Nov. 1840, 3 D. 31; *Cowan's case and Wilson's Trs.*, *infra*. See cases in 1 Fraser, 794.

In *Guthrie v. Cowan or Bell* (a), the father having disposed his whole property to trustees for behoof of the surviving spouse in life-rent, and the children in fee, the First Division were equally divided on the question, whether a post-nuptial contract in similar terms for behoof of the second wife and her children could receive effect as an onerous obligation. In support of the affirmative, reliance was placed on the authority of *Ersine and Bell* (b), to the effect that a post-nuptial contract is effectual against creditors to the extent of a moderate provision, in respect of the husband's natural right to aliment his wife. Minutes of debate were ordered, but the case was compromised. It has since been settled by a majority of the whole Court, in *Wilson's Trs. v. Pagan or Wilson* (c), in construing a provision in life-rent and fee to the widow and children of a second marriage, that the widow was entitled to be ranked as an onerous creditor; but that the children had no *jus crediti* in a question with the children of the first marriage claiming legitim, the provision not having been made payable at a period which might arrive before the death of the father (d).

In the case of *Mitchelson v. Mitchelson* (e), a father had directed the trustees of his *mortis causa* settlement to pay L.2000 to each of his younger daughters, and to convey the estate to the eldest. On entering into a second marriage, he bound himself to settle the estate upon the heirs-male of the marriage, to pay L.1000 to each of the younger children thereof, and reserved power to burden the estate with reasonable provisions to his daughters by the first wife. Although the reserved power was never exercised, the Court held it to be equivalent to a revocation of the fixed provisions bequeathed

Is a power to appoint of new equivalent to a revocation of existing Provisions?

(a) *Guthrie v. Cowan or Bell*, 21 Nov. 1846, 9 D. 124.

(b) *Bell's Com.* (5th Ed.) I. 642; and *Campbell's case*, there referred to.

(c) *Wilson's Trs. v. Pagan or Wilson*, 2 July 1856, 18 D. 1097.

(d) In the English case of *Coleman v. Seymour*, 1 Ves. 209, a father gave L.3000 to a married daughter for the use of her younger children, to be distributed amongst them as she should appoint; and Lord Hardwicke determined that the gift did not extend to her children by a second marriage;

and he was further of opinion that it extended only to children living at the making of the will, or, at furthest, at the death of the testator. But where a life-rent is limited to a parent, with remainder to his unborn children as he shall appoint (which is the usual form in English marriage-settlements), it would seem that the power embraces all the children (*Sugd. Powers*, 8th Ed., chap. 16, S. 1, § 31.

(e) *Mitchelson v. Mitchelson*, 15 Nov. 1820, F. C. See *Hamilton v. Hamilton*, 1741, M. 4137, 11,576.

to the daughters by the prior trust. We do not suppose that this case would now be followed as a precedent. It appears to be opposed to the doctrines laid down by the House of Lords in connection with the ademption of legacies in the recent case of *Kippen v. Darley* (a).

Can a Power of appointing Provisions to Children be exercised in favour of Grand-children?

It is now a settled point in the law of England, that a power to appoint in favour of children will not authorize an appointment to grandchildren (b). In the case of *Doe & Duke of Devonshire v. Cavendish* (c), a contrary opinion was in effect pronounced; but in the subsequent case of *Brudenell v. Elwes* (d), now a leading authority, it was decided that a limitation in a marriage-settlement to the use of the children "in such parts or proportions, and for such estate and estates, and with and under such charges, provisions, conditions, and limitations," as the spouses should appoint, was not an authority to give a share to grandchildren. But where, under a power to appoint to children, the father appointed to them absolutely, and then declared that the share of each of his daughters in the fund appointed was so appointed, and he thereby, *as far as he lawfully or equitably might or could*, ordered and appointed that the same should be held by his trustees for the daughter's separate inalienable use during life, and after her decease, for her children as she should appoint, etc., it was held that the words of appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their right by limitations to their issue was inoperative; but that it was competent to the donee of the power to settle the daughters' shares to their separate use, and to restrain them from anticipation or alienation (e).

Law of Scotland.

It may be held to be settled by Lord Mansfield's decision in *Cunynghame v. Cunynghame* (f), that a power to settle an heritable estate in Scotland on a younger child cannot be exercised in favour of a grandchild. But as regards power of settling provisions, it deserves to be considered whether the condition, *si sine liberis*, would not be implied where such a power is either reserved to a settlor or given to a near relative.

(a) *Kippen v. Darley*, 21 May 1858, 8 Macq. 203, affg. 18 D. 1137.

(b) See the cases cited by Lord St Leonards (Powers, Ch. 16, S. 1, § 2-9).

(c) 4 Term Rep. 744, n.

(d) *Brudenell v. Elwes*, 1 East. 442; 7 Ves. 382.

(e) *Carver v. Bowles*, 2 Russ. & Myl. 301.

(f) 1777, 2 Pat. 434.

A power of appointing provisions to heirs of the body or issue may, according to English authorities, and on principle, be exercised in favour of descendants *in esse* in any degree, unless an intention to restrict the benefit to immediate descendants is manifested (a).

Powers to appoint in favour of Issue.

Where a power was reserved in a deed of entail "to burden and affect the said lands and estate" with provisions for younger children, a bond granted in implement of this power was sustained, although it bound, not the estate, but the heirs of entail (b); and, in another case, it was held competent, in the exercise of a similar power, to grant a bond burdening the heirs in case only of the failure of the granter's own issue male (c).

Power to burden Entailed Estate.

Where estate is destined by marriage-contract to the heir, subject to a power of burdening with provisions to younger children, bonds of provision granted in virtue of the power are preferable in a competition with the heir (d). This principle was strongly exemplified in the case of *Russell v. Russell* (e). The estate was there destined to the eldest son, subject to provisions to the extent of L.8000 in favour of younger children; but in consequence of debts afterwards contracted, the free estate only yielded L.6000. The claim of the younger children was sustained, to the entire exclusion of the heir; and the shares of children dying in minority, which were declared by settlement to belong to the eldest son, were charged with the deficiency. A power of altering the amount of a burden imposed on the heir of the marriage is not held to have been exercised by laying a burden on him as executor. Both sums will be payable (f).

Appointees rank preferably to the Heir.

Provisions in favour of younger children are viewed as burdens on the property if made binding on the heirs in heritage, irrespective of the mode in which such provisions may have been constituted (g). And, therefore, in a case where provisions to children were constituted by personal bond, payable by the heirs succeeding

Bonds of Provisions binding the Heir are burdens on the Heritable Estate.

(a) Sugd. Powers, Chap. 6, S. 1, § 3-6.

(b) *Cleghorn v. Elliot*, 18 Jan. 1833, 11 S. 259.

(c) *Howden v. Porterfield*, 17 June 1834, 12 S. 734.

(d) *Erskine v. Erskine*, 24 May 1827, 5 S. 696.

(e) *Russell v. Russell*, 25 Feb. 1835, 13 S. 551.

(f) *Frew v. Frew*, 15 Feb. 1828, 6 S. 554.

(g) *Cleghorn v. Elliot*, *supra*.

the grantor in two estates, whereof the one was held in entail and the other in fee-simple, the heir first succeeding having died without making payment, it was found that the debt was a burden on the heir next succeeding, and not upon the executry of the first heir (a). Nor can an heir of entail evade payment of provisions granted in pursuance of a power, by passing over the grantor, and making up his title under a former heir (b). In the event of the heir becoming insolvent at the period when the succession opens to him, the children whose provisions have been made chargeable against him will rank as personal creditors upon the bankrupt's estate *pari passu* with his other creditors (c), unless the provisions have been heritably secured by the father, in which case they will be preferable, notwithstanding the supervening bankruptcy of the son within sixty days of the infestment (d).

Powers of
appointment
given to Trustees.

Sometimes a discretionary power of securing provisions is conferred upon trustees; in which case they must be guided by the directions of the testator in so far as his intention has been expressed. A declaration by a truster in the following terms,—“I am aware how very incorrect all these writings are; and I hereby empower my brother to alter any part of them he may think proper,”—was held not to import a power of altering the destination of any part of the property; but to be merely a precatory direction to execute such deeds as might be necessary for the purpose of giving effect to the intention (e). In the case of *Dennistoun v. Dalgleish* (f), the trustees having been directed to invest sums of L.20,000 for behoof of each of the testator's three daughters, “in such terms and manner that the relative writs or documents shall be payable or prestable to the said respective legatees themselves, or trustees for their or her behoof, in liferent, and their or her issue in fee,” the Court found that the provisions were not to be paid to the daughters, but to be secured for them in liferent, and their children in fee. And although a power of providing may have remained in abeyance beyond the period when the trustees were directed to exercise it,

(a) *Macdonald v. Lord Macdonald*, 29 May 1832, 10 S. 584.

(b) *Kennedy v. Kennedy*, 11 Feb. 1829, 7 S. 397.

(c) *Miller v. Wright*, 5 July 1836, 14 S. 1087.

(d) *Mansfield v. Stuart*, 13 Feb. 1833, 11 S. 389.

(e) *Monteath Douglas v. Douglas' Trs.*, 30 June 1859, 21 D. 1066.

(f) *Dennistoun v. Dalgleish*, 22 Nov. 1838, 1 D. 69.

the beneficiaries will not lose the provision, but may call upon the trustees to execute the power while any of their number are surviving (a). And in one case, where an heir of entail entitled to make a limited provision for his widow out of the estate died abroad, in ignorance of the death of the previous heir, whereby the power had devolved upon him, the Court awarded to his widow a provision equal to that which he might have conferred upon her in virtue of the power (b).

Where provisions have been granted in excess of the amount allowed by the power, the appointment is not void, but the Court will restrict the provisions to the maximum sum allowed by the grantor (c). Where the amount has been left blank in the deed of constitution, or defined generally,—as, for example, in a power to make “reasonable provisions,”—the Court may, in the exercise of its equitable jurisdiction, restrict a provision which it deems excessive; though the excess must be manifest to justify such interference (d). But if the power have been exceeded by giving a different estate from that which it authorizes, *e. g.*, a life instead of a fee (e), or by giving the estate to the wrong persons (f), the appointment will be set aside altogether. The effect of excessive execution of powers has been very carefully investigated by Lord St Leonards (g); but we have not space for an exposition of the distinctions recognised in the law of England.

Whether appointment is voidable for excess.

The extent to which provisions to widows and children may be granted under powers in a deed of entail, is usually determined by a reference either to so many years’ rental, or to a certain proportion of the annual rental, or by way of a locality. A provision of a fixed sum, made without reference to the power, will be effectual if the sum does not exceed the specified proportion (h); and where

Regulation of powers of appointment by Deed of Entail.

(a) *Cowan v. Crawford*, 20 Jan. 1837, 15 S. 398. See *Campbell v. Campbell*, 1788, M. 4076, 6849.

(b) *Campbell v. Campbell*, 25 Feb. 1809, F. C.

(c) *Strathallan v. D. of Northumberland*, 20 May 1840, 2 D. 840. Contrary held as to powers of division; see Section III. *infra*.

(d) See *E. of Rothes v. Rothes*, 21

Jan. 1823, 2 S. 185; *E. of Mar v. Lady Erskine*, 3 Dec. 1830, 9 S. 126.

(e) *D. of Northumberland v. M'Gregor*, 28 Aug. 1846, 5 Bell, 396; *Ozley v. Baikie's Trs.*, 14 Feb. 1862.

(f) *Wight v. Wight*, 9 July 1818, Hume, 539; *Watson v. Robertson*, 17 Feb. 1837, 15 S. 586.

(g) *Powers*, 8th Ed., Ch. 10.

(h) *Crawford v. Hotchkis*, 11 Mar. 1809, F. C.

the provision is by way of locality, a right of patronage may lawfully be included (a). It is moreover a fixed canon of construction, that the value of a locality provision is to be estimated as at the date of the grant, notwithstanding that the locality lands may have increased in value between that period and the death of the granter (b).

Aberdeen and
Entail Amend-
ment Acts.

The subject of provisions to wives and children under the Entail Law is an extensive one; and it would serve no good purpose to consider the special cases of construction of such provisions when made in the exercise of powers, apart from the cases which have arisen on the construction of the Aberdeen and Entail Amendment Acts. Our object in the foregoing observations has been simply to direct the attention of the reader to decisions of more general interest arising under the Entail Law, but illustrative at the same time of principles universally applicable to the construction of powers of provision, whether conferred by deeds of entail or other instruments. Having completed our review of the authorities relating to absolute powers of appointing provisions, we proceed to the consideration of the special doctrines pertaining to the subject of powers of division.

SECTION III.

OF POWERS OF DIVISION (c).

Objects attain-
able by con-
veyance, sub-
ject to a power
of Division.

When a sum of money is settled upon minor children, it is not unusual to confer upon the surviving parent a discretionary power of apportioning the bequest amongst the several members of the family according to their necessities or deserts. A similar power may be reserved by the granter of a marriage-contract provision, where the purpose is to secure a fixed sum to the family, without

(a) *D. of Roxburghe v. Roxburghe*, 25 June 1818, F. C.

(b) *Agnew v. Agnew*, 12 Dec. 1810, F. C., footnote, 161; *Malcolm v. Malcolm*, 21 Nov. 1823, 2 S. 514.

(c) Some illustrations especially applicable to this branch of the subject will be found in the previous section. In an exact system of arrangement, this

section ought to have been combined with the preceding; but as it is not quite clear that the rules of construction applicable to powers of simple appointment are identical with those which regulate powers of division, it was thought to be better to keep the distinction clearly in view, even at the cost of some little repetition.

interfering with the father's discretion as regards the distribution of the money. One main object in view in the settlement of provisions by ante-nuptial contract, is that of conferring a *jus crediti* on the children of the marriage,—an object which can only be attained by the husband or some other responsible party coming under an obligation to pay a fixed sum at a period which may happen during his lifetime, *e. g.*, at the dissolution of the marriage. If the husband is desirous at the same time of retaining his power of testing upon the fund so appropriated, he may, to a certain extent, accomplish that purpose by reserving to himself a power of division. The cases of *Browning v. Browning's Trustees* (a) and *Goddard v. Stewart* (b) show the importance of attending, in the framing of settlements, to the conditions which can alone secure a *jus crediti*, namely, an absolute obligation to pay, that obligation being prestable at a period which may happen in the husband's lifetime.

A provision in favour of children contained in a marriage-contract is onerous, and, notwithstanding the reservation of a power of distribution, vests in the children as a class from the time at which the provision is made payable or made chargeable with interest. In the case of *Sivright v. Dallas* (c), where a fund was secured by post-nuptial contract to the parents in liferent, and to the children *nascituri* in fee, the Court seem to have been of opinion that a contingent fee vested in each child at birth, defeasible by the appointer to a certain extent during his lifetime; and this appears to us to be the more correct view. And accordingly, although the father had executed a deed of apportionment giving the bulk of the money to his daughter, and she died, bequeathing her interest to her uncle, the Court sustained a revocation of the appointment executed after the daughter's death, and held that the presumption was for an equal division. A liferent given by a stranger to a father in conjunction with a power of apportionment among his children, does not import a fee in the person of the father. This proposition may be deduced from the general doctrine of liferents with powers of appointment superadded, as explained in the previous

Such Provisions vest in the Children; as a class.

(a) *Browning v. Browning's Trs.*, 25 May 1837, 15 S. 999. opinion; *Miller v. Miller's Trs.*, *infra*.

(b) *Goddard v. Stewart*, 9 Mar. 1844, 6 D. 1018, see Lord Moncreiff's (c) *Sivright v. Dallas*, 27 Jan. 1824, 2 S. 643.

chapter; and it was expressly laid down in the case of *Miller v. Millers* (a).

Powers of
Division given
to Trustees.

A power of division is sometimes given to trustees, which may relate either to the appointment of family provisions, or to the selection of objects of charity or benevolence. Where a power is given to trustees of settling marriage portions, or advancing sums for the establishment of children in business, it is usual to specify a maximum sum, which thus furnishes a rule of limitation for the appointment. But in a case where the sum had been left blank (b), the Court authorized the trustees to fill up the blank with such a sum as was just and reasonable, according to their sound discretion.

Whether such
powers lapse
by non-exer-
cise at speci-
fied time?

In the case of *Macdonald's Trs. v. Muir* (c), the settlor bound his trustees, on his daughter attaining majority, or on her previous marriage, to lay out the sum of L.1500 on heritable bonds, or other proper security; but the trustees failed to invest the money when the beneficiary became of age, and the lady afterwards married. In an action, to which the surviving trustee was a party, the Court found that the power had not lapsed by non-exercise at the period appointed by the settlor; and that it was the duty of the surviving trustee to execute the power.

Whole Fund
must be di-
vided.

The whole fund must be divided amongst all the grantees of the settlement; and if this is done, the Court will not interfere with the appointment on the allegation that any of the shares is inadequate, unless the sum appointed is so small as to be elusory (d).

Is Elusory
Appointment
objectionable?

It has been settled by two concurring decisions of the Court, that the entire exclusion of any one child, or of the representatives of any child in whom a *jus quæsitum* has vested, nullifies the appointment (e). But it has not yet been authoritatively decided whether the appointment of an elusory share is maintainable, though an opinion in the negative was given by the judges in the case of

(a) *Miller v. Millers*, 14 Nov. 1833, 12 S. 31; and see also *Ormiston v. Ormiston*, 24 Jan. 1809, Hume, 531.

(b) *Stewart v. Stewart*, 26 Nov. 1813, F. C., *supra*, 578.

(c) *Macdonald's Trs. v. Muir*, 9 Dec. 1851, 14 D. 152.

(d) *Dunbar's Trs. v. Shaw*, 13 Nov. 1805, Hume, 265; *Wight v. Wight*, and *Watson v. Robertson*, *infra*.

(e) *Ersk.* 3, 8, 49; *Wight v. Wight*, 9 July 1818, Hume, 539; *Watson v. Robertson and Marjoribanks*, 17 Feb. 1837, 15 S. 586.

Watson v. Marjoribanks (a). The Court of Chancery in England was in the habit of setting aside unequal appointments, as being contrary to equity,—a practice which gave rise to much litigation, and ultimately proved unworkable. To correct this error, the Act 1 Will. IV. cap. 46, was passed, which declared that appointments should be valid and effectual, “notwithstanding that any one or more of the objects should not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power (b). It is thought that, in the absence of any ruling authority on the subject, our Courts would not now refuse effect to an appointment on the ground of its containing elusory provisions, in opposition to the policy sanctioned by the Legislature for England. The authorities on the point were ably reviewed by Lord Cuninghame in giving his opinion in *Crawcour v. Graham* (c); and he arrived at the conclusion, that it was not competent or expedient to limit in any way the exercise of a faculty of apportionment.

English Statute.

The case last mentioned raised another question, upon which indeed the decision ultimately turned, namely, Who are the parties entitled to challenge an irregular appointment? In the previous case of *Watson v. Marjoribanks* (d), the appointment was set aside at the instance of certain of the children, on the ground that two other children, then deceased, and who were not represented in the process, had been passed over. It was observed by the Lord Ordinary, and assumed by the Court, that any one of the children had a legal interest to set aside the deed of appointment, although he himself had not been excluded. This right seems to arise clearly from the position of all the children as beneficiaries under the original settlement. In *Crawcour's* case, the action was at the instance of the creditors of the excluded legatees. The whole Court were consulted, and were of opinion (Lords Fullerton and Jeffrey dissenting) that the right of challenge was personal to the children, and could not be exercised by creditors. The Lord Justice-Clerk Hope pointed out that the very object of reserving a power of distribution might be to prevent the parent's money going to the cre-

Who may challenge defective Appointment?

(a) *Watson v. Marjoribanks*, 17 Feb. 1837, 15 S. 586.

(c) *Crawcour v. Graham*, 3 Feb. 1844, 6 D. 589.

(b) 11 G. IV. & 1 W. IV. cap. 46.

(d) *Watson v. Marjoribanks*, *supra*.

ditors of a son who was hopelessly involved in debt, and added, "That the actual interest of the child, at the date of the deed exercising the power of distribution, is within the duty of the parent to consider and provide for, can hardly be disputed. If that interest is provided for in the way most beneficial to the child, and the child adopts and concurs in the exercise of the power, there is an end of the question" (a).

Fund settled on Children of a Marriage, if subject to an implied Power of Division.

It seems to be established by some of the older cases on marriage-contract provisions, that a fund specially destined to heirs or children of the marriage is subject to an equitable power of division (b), which is, of course, not validly exercised by conveying to the heir-at-law (c). In the more recent case of *Ponton v. Ponton* (d), the Court, adhering to Lord Jeffrey's interlocutor, sustained a deed of apportionment of a sum secured by ante-nuptial contract to the surviving spouse in liferent, "and to the heirs and bairns of the said intended marriage in fee;" but we doubt whether this decision would now be regarded as a precedent. In *Dykes v. Dykes* (e), the expression, "heir or heirs" of the marriage, in a contract of marriage binding the husband to convey heritable estate, was interpreted to mean the heir-at-law; and a conveyance of part of the estate to a younger son was held to be *ultra vires*, and a fraud upon the heir. But a power to divide the price of a wife's estate among the "heirs and bairns of the marriage" was found to be validly exercised by entailing the estate on the eldest son, and charging it with bonds of provision in favour of the younger children (f).

Whether Children of second Marriage have a right to participate.

On the subject of apportionment between children of a first and second marriage, two cases are reported, which sufficiently exhibit the principles by which the Court will be guided in the determination of such questions. In the first of these cases, the husband had bound himself to pay to the children in existence at the dissolution of his first marriage L.9000, divisible at his pleasure, or the sum of L.6000, if there should be only one surviving. The wife died, leaving two children; and the husband, having entered into a second

(a) 6 D. 596.

(b) *Herries v. Herries*, 26 Nov. 1806, Hume, 528. See the prior cases cited in 1 Fraser, 768.

(c) *Ormiston v. Ormiston*, 24 Jan. 1809, Hume, 531.

(d) *Ponton v. Ponton*, 14 Feb. 1837,

15 S. 554.

(e) *Dykes v. Dykes*, 9 Feb. 1811, F. C.

(f) *Erskine v. Erskine*, 17 Jan. 1826, 4 S. 357.

marriage, and after the death of one of these children, a son, indorsed on the contract a memorandum, apportioning L.3500 as the share of the surviving child, but making no mention of her deceased brother. The Court refused to sustain the appointment, and found that the surviving child had right to the whole L.6000, one-half in her own right, and one-half as executrix of her brother (*a*). The question in the other case alluded to, related to the extent of a power of apportionment granted to a lady over a sum of money left by her uncle "for the benefit of her children." The lady, after she became a widow, executed a deed of apportionment, disposing of the whole property to the children of her late husband, but reserving a power of alteration in the event of a second marriage. The Court refused in a declarator to sustain this deed as a valid apportionment, holding that its validity would depend on whether the reserved power was or was not executed. A new deed was then executed, setting apart a sum for the children of any future marriage, with a destination over to her eldest son. A new action of declarator having been brought, the deed was sustained (*b*).

It is immaterial in what form a power of apportionment is exercised. Thus, if the terms of the power are complied with, the appointment may either be by deed of appointment, as in *Hunter v. Eccles* (*c*), or as part of a marriage-contract, or by bond of provision (*d*), or by a will or testamentary disposition, in which the fund may have been dealt with as the appointer's own property (*e*).

Form of Deed
of Appoint-
ment;

The apportionment may be made by appropriating a specific fund to one of the children, and allotting the residue to others; and if the fund so appropriated be irrecoverable, the residue will not be chargeable with the loss sustained by the special appointee (*f*). But where a father who had conveyed his estates by ante-nuptial contract to the children of the marriage, subject to a power of division, afterwards acquired by purchase certain heritable property,

by way of
fixed Legacies
and Residue;

(*a*) *Brodie's Trs. v. Mowbray's Trs.*, 12 Nov. 1840, 3 D. 31.

(*b*) *Hunter v. Eccles' Trs.*, 7 Mar. & 17 July 1856, 18 D. 778, 1303. See *Guthrie v. Bell*, 21 Nov. 1846, 9 D. 124, as to power to provide for wife in event of second marriage; and cases on Powers of Disposal, *antea*, p. 514.

(*c*) *Hunter v. Eccles' Trs.*, 17 July 1856, 18 D. 1334.

(*d*) *Erskine v. Erskine*, 17 Jan. 1826, 4 S. 357.

(*e*) *Milne v. Milne*, 6 June 1826, 4 S. 679. See Section I., *supra*.

(*f*) *Waddell v. Waddell*, 20 July & 15 Dec. 1842, 5 D. 309.

by way of
Liferent and
Fee.

taking the titles to himself, his heirs and assignees, it was held that the taking the title to the acquired property in these terms was not an exercise of the power of division in favour of his eldest son and heir; and the estate was declared to be subject to equal division, along with the rest of the property. In the recent case of *Oxley v. Baikie's Trs. (a)*, the question was raised, whether the donee of a power of division among children is entitled to create a life interest out of the fund. The fund was L.2000; and the donee had executed a deed of appointment, by which she gave to one of her children L.5 down, and the liferent of L.1000; and to the other, L.995, and the reversion of L.1000 on the expiry of his sister's liferent. A majority of the judges of the First Division, concurring in opinion with Lord Jerviswoode, held that the deed of appointment was *ultra vires*. Lord President McNeill rested the judgment on the ground that the direction in the bond of provision which contained the power, was to hold a capital sum for behoof of the donee in liferent, and her children in fee, subject to the power of division; and that, as the share of one daughter had been given chiefly in the shape of a liferent, the power had been exceeded. Lord Deas dissented on the ground, as we understand, that the L.5 actually given to Mrs Oxley would have stood as a good appointment in itself, and that the addition of a liferent of L.1000 was not a matter of which she was entitled to complain. It appears to us that this reason would equally apply to the case of an appointment to strangers, if only L.5 a-piece had been given to the legatees. The answer is, that every legatee is entitled to insist that the *whole fund* should be distributed; and may fairly enough presume that if a larger share were at the trustees' disposal for immediate distribution, his own share of the fee would be increased. An absolute provision of a fixed sum to one child will not be presumed to be in exercise of a power of distributing a specific fund (b).

Power to
divide
amongst
Settlor's
Relations.

By the law of England, a trust for distribution among the settlor's "relations" is divisible exclusively amongst the heirs who would be entitled to succeed under the statute of distribution, that is, amongst

(a) *Oxley v. Baikie's Trs.*, 14 Feb. 1862, 24 D. As to whether a power of appointment can be exercised by limiting a liferent, see p. 512, *supra*.

(b) *Greenock Banking Co. v. Smith*, 17 July 1844, 6 D. 1340.

the nearest of kin according to the local law of succession (a). The tendency of the older Scotch cases was towards a more liberal construction of the word (b); this view received a certain degree of confirmation from the decision of Lords Cranworth and St Leonards in *Scott v. Scott* (c), holding that a bequest of residue to "nearest relations" was, according to the settlor's intention, meant to include children of a half-sister. But in the subsequent case of *M'Cormack v. Barber* (d) the point was considered still open; and the Lord President (e) was of opinion, that in the absence of expressions indicative of a different intention, the word "relations," meant nearest relations, or next of kin. But it was ruled by the majority of the Court, that where a discretionary power was given, the trustees were entitled to distribute (by selection) amongst all who could show a traceable and distinct relationship to the testator; although, in the exercise of the power, they had allotted but a small fraction of the estate to the next of kin (f). According to the opinion of Lord Curriehill (g), a bequest to "relations," unaccompanied by a power of selection, might be void for uncertainty; but this view is at variance with the decision in *Scott v. Scott*; and the better opinion seems to be, that the principle enunciated by the Lord President, of equal division amongst the next of kin, would apply to a legacy unaccompanied by a power of distribution.

Directions to trustees to lay out money on charities (h), or to establish a permanent trust for the benefit of the grantor's descendants (i), are not void for uncertainty; on the contrary, a power of appointment is implied. It is a settled rule, and one that has been

Power to divide amongst objects of Charity, etc.

(a) Sugd. Powers, 8th Ed. Chapter XV.; Jarman on Wills, 3d Ed. II. 108; and see a summary of the cases in Lewin, Tr., 4th Ed. 537, 538. The rule is the same where the bequest is to "poor relations;" Lewin, Tr., id. page.

(b) *Brown's Trs. v. His Relations*, 1762, M. 2318; *Wharrie v. Wharrie's Relations*, 1760, M. 6599; *Murray v. Fleming*, 1729, M. 4075; *Dick v. Ferguson*, 1758, M. 7446; *Snodgrass v. Buchanan*, 16 Dec. 1806, F. C.; *Hill v. Burns*, 14 April 1826, 2 W. & S. 87; *Crichton v. Grierson*, 25 July 1828, 3 W. & S. 329.

(c) *Scott v. Scott*, 10 May 1855, 2 M.Q. 281, affg. 14 D. 1057.

(d) *M'Cormack v. Barber*, 25 Jan. 1861, 23 D. 398.

(e) Lord Colonsay, 23 D. 411.

(f) See 23 D. 409, per Lord Deas.

(g) 23 D. 406. See the previous cases distinguished in Chap. VIII. (Implied Trusts).

(h) *Dundas v. Dundas*, 27 Jan. 1837, 15 S. 427; and *Morgan's case*, *infra*.

(i) *M'Nair v. M'Nair*, 1791, M. 16210; *Cairnie v. Cairnie's Trs.*, 14 Nov. 1837, 16 S. 1.

constantly adhered to in our practice, that the Court will not execute a discretionary power (a); the case of charitable trusts being the only exception (b).

If the power has not been exercised, the division will be equal.

It is not quite clear that a power of division appointed to be executed on the occurrence of a particular event, such as majority or marriage, can be enforced, if any considerable time has been allowed to elapse beyond the stipulated period (c). In default of execution of a power of apportionment, either by failure to exercise, or by an irregular exercise of the power, the division will be equal (d).

(a) *Burnsides v. Smith & Ors., etc.*, 10 June 1829, 7 S. 735; *Ireland v. Glass*, 18 May 1833, 11 S. 626; *Macdonald's Trs. v. Macdonald*, 14 Feb. 1842, 4 D. 678; *Muir v. Pollock*, 9 Dec. 1851, 14 D. 152; *Campbell v. Campbell*, 1738, M. 4076, 6849.

(b) *Miller & Ors. v. Black*, 14 July 1837, 2 S. & M'L. 866; and see Chapter XX.

(c) See *Stein v. Stein*, 8 Dec. 1826, 5 S. 101; *Macdonald's Trs. v. Muir*,

9 Dec. 1851, 14 D. 152; and *Cowan v. Crawford*, 20 Jan. 1837, 15 S. 398.

(d) *Sivright v. Dallas*, 27 June 1824, 2 S. 643; *Watson v. Marjoribanks*, 5 S. 586, 591; *Thomson v. Cumberland*, 16 Nov. 1814, F. C.; *More v. Grier*, 1693, M. 14720. As to the period when a division ought to be made, see *Dunbar's Trs. v. Shaw*, 13 Nov. 1805, Hume, 265; *M'Cormack v. Barber*, 25 Jan. 1861, 23 D. 398.

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